Akin Gump
STRAUSS HAUER & FELD LLP

MARK J. MACDOUGALL
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mmacdougall@akingump.com

January 31, 2023

Dear Judge:

I am writing in support of the application of Rebecca Kamas for a federal judicial clerkship following her graduation from the Georgetown University Law Center in May 2023.

My acquaintance with Rebecca came about through her participation in courses in Federal White Collar Crime and Sentencing Law & Policy that I teach as an adjunct professor at Georgetown. Rebecca was one of the most active and articulate classroom participants – which was reflected in the grade that she received (A) in both courses. Rebecca is a fine scholar, an articulate advocate for an always well-considered viewpoint, and will soon be a superb lawyer in every respect.

One thing that I have learned as a trial lawyer is to deliver any significant message in no more than three parts. With that lesson in mind, the following are the most important considerations that I believe make Rebecca a strong candidate for a federal judicial clerkship.

The first thing that I would like you to know about Rebecca Kamas as a law student is that she is always prepared, clear in her presentation, never reluctant to offer her cogent perspective and respectful of other points of view. She is also a fine, clean and concise writer whose work requires no second reading in order to be understood and appreciated. That combination is rare among the lawyers with whom I practice every day – and even more difficult to find in a new law graduate.

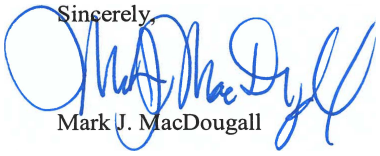
Another consideration that I would suggest be given a good deal of weight in considering Rebecca's candidacy, is the fact that her record of academic success has been achieved while filling a series of responsible, full-time positions with the Department of Justice. I know, from my own experience many years ago, the kind of unrelenting stress that attends students in an evening program at a competitive law school. Rebecca's proven ability to effectively manage a responsible job, while at the same time achieving considerable academic success at Georgetown, should affirm her ability to perform at the highest levels as a federal judicial clerk.

Finally, I think law school drives to the surface the real personalities of students as well as teachers. If there is any truth to that notion, Rebecca will be a genuine pleasure to have as a colleague every day — for her judge, other clerks and courthouse staff alike. In every discussion, both inside and outside of the classroom, Rebecca displays a combination of a

pleasant disposition, personal kindness and a real sense of joy in her work and her life. Those are probably the most difficult characteristics to find in a large pool of newly graduated lawyers and at the same time the most necessary.

So I can recommend Rebecca Kamas to you in the strongest terms for consideration as a judicial clerk. I will be happy to respond to any further inquiries regarding her candidacy.

Sincerely,



Mark J. MacDougall

Rebecca Kamas
Silver Spring, MD | 512-665-8351 | rrk24@georgetown.edu

WRITING SAMPLE

The attached writing sample is a memorandum I wrote while interning with the Public Integrity Section (PIN) of the Department of Justice in Fall 2022. The assignment was to evaluate whether two defendants in different branches of a common conspiracy could be charged together under Fifth Circuit law. The research and analysis in this memo informed the prosecution team's decision on whether to keep the conspiracy charge or continue only under the substantive offenses. After reviewing this memo, the team decided to proceed with the conspiracy count and ultimately convicted both defendants on all counts. I performed all of the research and this work is entirely my own. This memo has been anonymized at PIN's request and is used with their permission.

To: [Redacted] Prosecution Team
From: Rebecca Kamas
Re: Charging Conspiracies in the Fifth Circuit

MEMORANDUM

Question Presented:

I. Under Fifth Circuit law, is the Court likely to permit Defendant One and Defendant Two to both be charged under a single honest services fraud conspiracy charge when, following the death of Cooperator, there is no admissible testimony that they were aware of each other's involvement in the conspiracy?

II. If the Court allows the government to proceed under a single conspiracy theory for both Defendants, under Fifth Circuit law, would a conviction survive appellate scrutiny?

Brief Answer:

I. Likely yes; there is a common objective of honest services fraud of influencing the City Commission in the selection of certain companies for a municipal construction project, an interdependence of parts of the scheme since it would not be successful if the conspirators were unable to secure enough commissioner votes to approve the contracts, and Cooperator was a "key man" who directed both branches of the conspiracy.

II. Yes; the Fifth Circuit is unlikely to overturn an honest services conspiracy fraud conviction on appeal because even if the evidence offered at trial supports a finding of multiple conspiracies, the Court is unlikely to find that such variance prejudiced the Defendants.

STATEMENT OF FACTS

After receiving a notice from the State Commission on Environmental Quality warning that the city's existing infrastructure was operating over capacity, the city commission of City, State approved the issuance of municipal bonds to fund infrastructure projects, including over $25M for several municipal construction projects. Company X was awarded a contract to act as a construction manager for several of the planned construction projects.

Cooperator served as a middleman between Company X, Company Y, Company Z, and certain city commissioners. He accepted at least $4M to pay in bribes to city commissioners to

gain their support for the award of the overarching project management contract to Company X; to approve the award of additional construction projects to Company X, Company Y, and Company Z; and to make other favorable changes to the terms of the contract or the budget allocation.

Cooperator worked with Defendant One to funnel bribes to Defendant One's cousin, City Commissioner A, so that he would use his seat on the city commission to vote to approve the contract awards. Likewise, Cooperator also worked with Defendant Two to funnel bribes to City Commissioner B to gain his support for the projects. Both Defendant One and Defendant Two kept a portion of the bribe payments they funneled to the respective commissioners.

Cooperator was confronted by federal agents and agreed to cooperate with the government. He was going to testify that Defendant One and Defendant Two were aware of their common participation in the conspiracy. However, before the case could proceed to trial, Cooperator died and, for purposes of this memorandum, it can be assumed that the Government has no other admissible testimony proving that Defendant One and Defendant Two knew of the other's participation in the conspiracy.

ANALYSIS

In *Kotteakos v. United States*, the Supreme Court held that it is impermissible to charge defendants in a single conspiracy when their actions are independent and they have no knowledge or reason to know of the illegal actions taken by others. 328 U.S. 750 (1946). Analogizing the structure of this type of conspiracy to a wheel with a hub and series of unconnected spokes, the Court found that despite the similar illegal objectives of each "spoke", none of the conspirators were aided by or had any interest in the success of the others. *United States v. Perez*, 489 F.2d 51, 60 (5th Cir. 1973) (citing *Kotteakos*, 328 U.S. 750). In the more-

than-70-years since *Kotteakos*, the Fifth Circuit has moved away from the hub-and-spoke analogy, instead focusing on a fact-specific inquiry to determine if defendants participated in a single conspiracy or distinct conspiracies. "Finding that they impede rather than facilitate analysis of the 'single conspiracy—multiple conspiracy' issue, we eschew utilization of figurative analogies such as 'wheels,' 'rims' and 'hubs,' which are often used to describe the nature of complex conspiracies." *United States v. Elam*, 678 F.2d 1234, 1246 (5th Cir. 1982) (citing *Perez*, 489 F.2d at n11). Instead, the Fifth Circuit has developed and relied on a three-factor test that is used to determine if one or multiple conspiracies exist. Courts in the Fifth Circuit consider: (1) the existence of a common goal, (2) the nature of the scheme, and (3) the overlapping of the participants in various dealings. *United States v. Morrow*, 177 F.3d 272, 291 (5th Cir. 1999) (per curiam); *United States v. Richerson*, 833 F.2d 1147, 1153 (5th Cir. 1987).

I. Fifth Circuit test for counting conspiracies

A. Common Purpose

In order to find a single conspiracy, "there must be one objective, or set of objectives, or an overall objective to be achieved by multiple actions." *Perez*, 489 F.2d at 62 (5th Cir.1973). Courts in the Fifth Circuit have broadly defined the common purpose element of the conspiracy counting test. *Morrow*, 177 F.3d at 291; *see also United States v. Morris*, 46 F.3d 410, 415 (5th Cir. 1995) (internal quotation marks omitted) ("In fact, one panel has remarked that given these broad common goals the common objective test may have become a mere matter of semantics.")

In *United States v. Leach*, the Fifth Circuit considered whether homeowners who did not participate in the same transactions in an insurance fraud scheme should be tried together despite their claim that they had no connection with, or knowledge of, each other. 613 F.2d 1295 (5th Cir. 1980). The Fifth Circuit decided that joinder of defendants was proper because each

participated in the single charged conspiracy. *Id.* at 1298-99. Reasoning that a jury could find that the defendant-appellants knew or should have known that the conspiracy had a scope beyond the single insurance claim in which each participated, the court found a common purpose of committing home insurance fraud. *Id.* at 1299.

In considering conspiracies that span long time frames, diverse participants, varied means, or multiple objectives, courts in the Fifth Circuit have also found common purpose:

(1) in "mutual enrichment" in a mail fraud conspiracy involving false representations about silver ore options sales, refining contracts, and loan fraud (*United States v. Becker*, 569 F.2d 951, 955 (5th Cir. 1978));

(2) in deriving personal gain from fraud against a single company (*Richerson*, 833 F.2d at 1153);

(3) where the coconspirators "shared a common goal of enriching themselves by profiting from the leveraged selling and reselling of real estate along I–30" (*United States v. Jenson*, 17 F.3d 745, 761 (5th Cir. 1994));

(4) in deriving personal gain through real estate fraud (*United States v. Beacham*, 774 F.3d 267, 273-74 (5th Cir. 2014)); and

(5) in personal gain from the sale of drugs (*United States v. Dawes*, 222 F. App'x. 399, 402 (5th Cir. 2007)).

In the present case, the Court is likely to find that Defendant One and Defendant Two operated with a common purpose. Both Defendants had the goal of bribing officials on the same city commission to vote to approve specific contracts that favored Company X, Company Y, and Company Z. Like the court in *Leach*—which found the defendants had a common purpose of

enriching themselves through insurance fraud—here, the Court is likely to find that Defendants had a common purpose of self-enrichment through honest services fraud.

B. Nature of the scheme

The Fifth Circuit has found that the nature of a scheme points to a single conspiracy where the activities engaged in by one part of the conspiracy benefit or support the other parts. "[I]in considering the nature of the scheme, a single conspiracy 'will be inferred where the activities of one aspect of the scheme are necessary or advantageous to the success of another aspect or to the overall success of the venture.'" *Beacham*, 774 F.3d at 274 (quoting *Morris*, 46 F.3d at 415 (5th Cir. 1995)); *Elam*, 678 F.2d at 1246.

In *United States v. Perez*, the Fifth Circuit considered whether a scheme that involved a series of staged automobile accidents with different participants in different locations constituted a single conspiracy. 489 F.2d 51. Finding that testimony presented at trial aligned with the "common sense of the scheme", the court reasoned that the conspiracy would have *had* to involve a series of staged accidents for the rewards to be high enough to justify the risk for the necessary doctors and lawyers. *Id.* at 62-63. Finding a common purpose and not just a series of "one shot" events, the Fifth Circuit determined that the common reliance on the doctors and lawyers meant that none of the individual participants in any of the staged crashes could have been unaware that there must have been other accidents. *Id.*

Where there is no mutual benefit or overarching plan, courts in the Fifth Circuit are unlikely to find an interdependent or common nature of the scheme. *Compare Morrow*, 177 F.3d 272 (5th Cir. 1999) (finding the sales managers at different mobile home sales lots were each necessary "cogs" in a single larger conspiracy to commit bank fraud through short down payments and falsifying customer information directed by the owners of the franchise) *with*

United States v. Sutherland, 665 F.2d 1181 (5th Cir. 1981) (concluding that a scheme where a judge conspired with two different individuals in different time frames to engage in identical frauds related to the disposition of traffic tickets were not sufficiently interdependent to be considered a single conspiracy).

Courts have reached varying results on whether identical schemes are evidence of a common nature. *Compare Sutherland,* 656 F.2d 1181 (finding an identical scheme was not determinative) *with Leach*, 613 F.2d 1295 (5th Cir. 1980) (finding a common nature where the homes involved in the insurance fraud scheme were all overvalued, never occupied by their owners, destroyed in similar explosions, lacked similar records, and shared a common transaction structure) *and Beacham*, 774 F.3d 267 (5th Cir. 2014) (finding a single conspiracy in a real estate fraud scheme where two coconspirators ended their association and each formed independent companies that had identical operations).

In the present case, the Court is likely to find that the actions taken by Defendant One to pay bribes to City Commissioner A and the actions taken by Defendant Two to pay bribes to City Commissioner B were interdependent rather than merely identical schemes. The approval of the contract awards required the votes of a majority of the city commissioners. Bribing only a single commissioner would have been insufficient on its own. Accordingly, the Court is likely to find that Defendants knew or should have known that there were multiple commissioners being bribed to facilitate the contract awards.

C. Overlapping Participants

Courts in the Fifth Circuit are more likely to find a single conspiracy when there are multiple overlapping and interconnected participants. *See, e.g.*, *Morris*, 46 F.3d at 416. However, the Fifth Circuit has also explained that a court needn't find that each member participated in

every transaction to find a single conspiracy. *Id.* "[W]here it is shown that a single 'key man' was involved in and directed illegal activities, while various combinations of other defendants exerted individual efforts toward a common goal, a finding of the existence of a single conspiracy is warranted." *Elam*, 678 F.2d at 1246. In *United States v. Morrow*, the court considered whether sales managers at different mobile home sales locations were part of the same conspiracy to commit bank fraud. 177 F.3d at 302. The court decided that the Government didn't have to show the sales managers were aware of each other, in part because the two franchise owners and a common banker were "key men" orchestrating the common goal. *Id.; see also Perez*, 489 F.2d at 58 (where a core group of three individuals formed the "hub" of the conspiracy); *Richerson*, 833 F.2d at 1154 (determining that "[a]ll the government had to show to establish overlapping participants was that [the two coconspirators at different companies] were conspiring with Richerson, a core conspirator, to pay bribes").

However, when there is a sole overlapping participant, but the other conspirators are separated from each other by time, the court is unlikely to find a single conspiracy. In *United States v. Sutherland*, the Government alleged a common conspiracy where two individuals each agreed to participate in a bribery scheme with Sutherland, a local judge. 656 F.2d 1181. The two individuals participated in identical schemes in different years and the Government alleged no contact or agreement between the two. *Id.* at 1194. The Fifth Circuit found Sutherland's overlapping involvement alone was not sufficient for a finding that they were all involved in the same scheme. *See also United States v. Levine*, 546 F.2d 658 (5th Cir. 1977) (concluding that two one-time commercial transactions with a common filmmaker was not a sufficient link to allege a single conspiracy included two customers of obscene films who were otherwise unaware of the other).

Here, Defendants are connected by a key man, Cooperator, who coordinated the bribes to City Commissioner A through Defendant One and City Commissioner B through Defendant Two. The schemes overlapped not only through the involvement of Cooperator, but also the scheme was ongoing over several years, as was the participation of both Defendants. Rather than a single key man running identical but otherwise unrelated schemes like in *Southland*, the participation of the key man was more like the common mobile home franchise owners in *Morrow.* Cooperator, like the franchise owners, simultaneously directed the activities of the Defendants in committing the honest services fraud.

II. Variance Between a Single Charged Conspiracy and Multiple Conspiracies Proved at Trial

A. The Existence of a Single Conspiracy Is a Question of Fact for the Jury

The jury should determine whether the evidence presented at trial establishes a single conspiracy or multiple conspiracies. *United States v. Mitchell,* 484 F.3d 762, 769 (5th Cir. 2007); *Beacham*, 774 F.3d at 273. The court must "affirm the jury's finding that the government proved a single conspiracy 'unless the evidence and all reasonable inferences, examined in the light most favorable to the government, would preclude reasonable jurors from finding a single conspiracy beyond a reasonable doubt.'" *Mitchell,* 484 F.3d at 769 (quoting *Morris*, 46 F.3d at 415).

Even if the evidence at trial shows multiple conspiracies where a single conspiracy has been charged, that does not itself create a material variance with the indictment. "[A]t most, such evidence creates a fact question and entitles the defendants to a jury instruction on the possibility of multiple conspiracies." *Sutherland*, 656 F.2d at n5. In *Morrow*, where the knowledge of activities at other sales locations by various alleged conspirators was in dispute and left to the

jury, "as a safeguard against prejudice, the jurors were cautioned in the instructions from finding guilt if the proof presented by the Government established any conspiracy other than that charged in the indictment." 177 F.3d at 291-92; *see also Mitchell*, 484 F.3d at 770-71 ("[T]he variance does not necessitate reversal since he has not demonstrated that it affected his substantial rights. . . . Furthermore, any risk of prejudice was minimized by the district court's instruction to the jury that it must acquit if it were to find that a defendant was not a member of the charged conspiracy, even if it were to find that the defendant was a member of some other conspiracy").

B. Standard on Appeal

Even if the Court here does find variance between the single conspiracy charged and the proof offered at trial, it would not be grounds for reversal unless the Defendants demonstrate it prejudiced their substantial rights. *Mitchell*, 484 F.3d at 770-71. In the single versus multiple conspiracy context, the most common prejudice would be the transference of guilt from one co-defendant to another. *Id.* "[W]here the indictment alleges a single conspiracy, and the evidence established each defendant's participation in at least one conspiracy a defendant's substantial rights are affected only if the defendant can establish reversible error under general principles of joinder and severance." *Jensen*, 41 F.3d at, 956; *see also United States v. Faulkner*, 17 F.3d 745, 762 (5th Cir.1994).

In *Sutherland*, after finding that the Government improperly charged a single conspiracy where two distinct conspiracies existed, the court explained that such an error would require reversal under *Kotteakos* if it affected the substantial rights of the defendants. 656 F.2d at1194-95. The Fifth Circuit analyzed the prejudicial effect under *Berger v. United States,* 295 U.S. 78 (1935), and *Kotteakos*, and found the facts in *Sutherland* distinguishable. In *Kotteakos,* thirty-

two defendants were charged together and the evidence established as many as eight separate conspiracies. 656 F.2d at 1196. In *Sutherland*, though, the court found that the defendant's substantial rights were not injured. The Fifth Circuit held that reversal was not required because: (1) the small number of defendants decreased the danger of jury confusion, (2) distinct evidence about each participant's conspiracy with neither set of evidence directly contradicting any portion of the defense as to the other conspiracy, and (3) "most importantly, the government introduced overwhelming evidence of guilt as to all three defendants, and this evidence would have been admissible in two separate trials on individual conspiracy counts." *Sutherland*, 656 F.2d at 1196.

III. Conclusion

The Government will likely succeed in arguing that Defendant One and Defendant Two can be properly joined in a single conspiracy due to the common goal approving contracts that benefited Company X, Company Y, and Company Z; the similar and interdependent nature of the acts taken by both Defendants; and the connection through a "key man" in the form of Cooperator. However, in order to guard against arguments of impermissible joinder on appeal, care should be taken to distinguish the facts from those in *Kotteakos*, and through a cautionary instruction to the jury, if appropriate, regarding the transference of guilt.

Applicant Details

First Name	**Ava**
Last Name	**Kamb**
Citizenship Status	**U. S. Citizen**
Email Address	**ak2003@georgetown.edu**
Address	**Address** **Street** **425 L St NW, APT 428** **City** **Washington** **State/Territory** **District of Columbia** **Zip** **20001** **Country** **United States**
Contact Phone Number	**6505159886**

Applicant Education

BA/BS From	**Reed College**
Date of BA/BS	**May 2018**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 19, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The Georgetown Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Griffin, Amy
amy.griffin@georgetown.edu
Ohm, Paul
ohm@law.georgetown.edu
Pasachoff, Eloise
eloise.pasachoff@georgetown.edu
(202) 661-6618

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ava Kamb
425 L Street NW #428
Washington, DC 20001

June 12, 2023

The Honorable Jamar K. Walker
United States District Court, Eastern District of Virginia
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year student at Georgetown University Law Center who earned a Master of Public Health degree from Columbia University, and I am writing to apply for a clerkship in your chambers for the 2024–2025 term. I am interested in a one-year term. I took a wonderful road trip through Virginia during my Spring Break two years ago, and I am excited for an opportunity to live in and further explore the state.

At Georgetown, I have developed diverse research and writing skills as an Executive Editor on The Georgetown Law Journal, a Legal Writing Law Fellow, a research assistant for multiple professors, and a Technology Law and Policy Scholar. In addition, having worked as a summer intern for Administrative Appeals Judges at the U.S. Department of Health and Human Services, I have experience drafting multiple judicial decisions at the appellate level. Now, I am eager to work at the trial court level in Virginia.

My resume, unofficial transcript, and writing sample are enclosed. Letters of recommendation from Georgetown Law Professors Pasachoff, Griffin, and Ohm are also attached. I can be reached by phone at 650-515-9886 and by email at ak2003@georgetown.edu. I would welcome the opportunity to interview with you, and look forward to hearing from you soon.

Thank you for your time and consideration.

Respectfully,

Ava Kamb

AVA KAMB

425 L Street NW #428, Washington, DC 20001 • (650) 515 9886 • ak2003@georgetown.edu

Interests: international travel, reading, hiking, knitting

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER — **Washington, DC**
Juris Doctor | GPA: 3.79, Dean's List — Expected May 2024
Journal: *The Georgetown Law Journal*, Executive Editor, Senior Board Member, Diversity Committee Member
Honors: Technology Law and Policy Scholar
Senior Writing Fellow (2023-24) and Legal Writing Law Fellow (2022-23)
Activities: Research Assistant for Professor Yael Cannon and for Professor Madhavi Sunder
Teaching Assistant for Computer Programming for Lawyers
90 hours pro bono work
Member of APALSA, Georgetown OutLaw

COLUMBIA UNIVERSITY MAILMAN SCHOOL OF PUBLIC HEALTH — **New York, NY**
Master of Public Health in Epidemiology | GPA: 4.066, Top 10% — Awarded May 2021
Honors: Delta Omega Honorary Society
Activities: President of Advocates for Asian American Health
Thesis: *Associations Between State Firearm Laws and Firearm-Related Suicide*
Research: Assistant to Dr. Christopher Morrison (2020-21) – Co-authored and presented published manuscript on ridesharing and motor vehicle crashes at the 2021 Society for Epidemiologic Research (SER) Conference

REED COLLEGE — **Portland, OR**
Bachelor of Arts in Religion — Awarded May 2018
Honors: President's Commendation for Academic Excellence: 2015–2016, 2017–2018
Thesis: *The Hospital Chaplain Between Worlds: Religion in Biomedical Spaces*
Internship: Software Design Studio (2016) – Worked on three-person team to develop a mobile app providing a campus walking tour using Python, Flask framework, HTML/CSS, Javascript, and OpenStreetMap data

EXPERIENCE

Georgetown Health Justice Alliance Clinic — **Washington, DC**
Student Attorney — Upcoming Fall 2023

Ropes & Gray LLP — **Washington, DC**
Summer Associate – Life Sciences and Regulatory Compliance Group — May – July 2023

U.S. House of Representatives, Committee on Oversight and Reform — **Washington, DC**
Legal Intern — September – December 2022
- Citechecked investigation report and drafted new policy language for drug approval bill
- Researched bills and developed question lines in preparation for hearing on reproductive health policy reform

U.S. Department of Health and Human Services, Departmental Appeals Board — **Washington, DC**
Legal Intern — May – August 2022
- Reviewed lower court records, identified applicable prior decisions, and made ruling recommendations
- Prepared five draft decisions for Administrative Appeals Judges on Medicare coverage appeals

Asian Pacific American Network of Oregon (APANO) — **Portland, OR**
Development Associate — May 2018 – July 2019
- Accrued over $100,000 for organization as lead grant writer for health programming
- Managed organization's health policy portfolio through lobbying, canvassing, testimony, and representing organization at statewide coalitions, including at the Oregon Governor's table

Field Organizer
- Coordinated grassroots canvassing, phone-banking, and membership outreach at Asian American/Pacific Islander racial justice organization

References

Amy Griffin, Legal Writing Professor at Georgetown Law – Law Fellow Seminar
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Eloise Pasachoff, Professor at Georgetown Law – Administrative Law and Public Administration Seminar
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Paul Ohm, Professor at Georgetown Law – Intermediate Computer Programming for Lawyers
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Nicole Smith, Supervising Attorney at U.S. Health and Human Services Departmental Appeals Board
Email: nicole.smith1@hhs.gov
Phone: 717-860-0266

Neel Sukhatme, Supervising Professor on Georgetown Law research project
Email: Neel.Sukhatme@law.georgetown.edu

Record of: Ava Kamb
GUID: 828867678

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	001	94	Civil Procedure Aderson Francois	4.00	B+	13.32	
LAWJ	002	41	Contracts Gregory Klass	4.00	A	16.00	
LAWJ	004	41	Constitutional Law I: The Federal System Josh Chafetz	3.00	B+	9.99	
LAWJ	005	41	Legal Practice: Writing and Analysis Jonah Perlin	2.00	IP	0.00	

	EHrs	QHrs	QPts	GPA
Current	11.00	11.00	39.31	3.57
Cumulative	11.00	11.00	39.31	3.57

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	003	94	Criminal Justice Christy Lopez	4.00	A-	14.68	
LAWJ	005	41	Legal Practice: Writing and Analysis Jonah Perlin	4.00	A	16.00	
LAWJ	007	94	Property Madhavi Sunder	4.00	A-	14.68	
LAWJ	008	41	Torts John Hasnas	4.00	A-	14.68	
LAWJ	025	50	Administrative Law Eloise Pasachoff	3.00	A-	11.01	
LAWJ	611	09	Corporate Compliance in the Financial Sector: Anti-Money Laundering and Counter-Terrorism Financing Jonathan Rusch	1.00	P	0.00	

Dean's List 2021-2022

	EHrs	QHrs	QPts	GPA
Current	20.00	19.00	71.05	3.74
Annual	31.00	30.00	110.36	3.68
Cumulative	31.00	30.00	110.36	3.68

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	1491	18	Externships I Seminar (J.D. Externship Program) Manpreet Teji		NG		
LAWJ	1491	86	~Seminar Manpreet Teji	1.00	A-	3.67	
LAWJ	1491	88	~Fieldwork 3cr Manpreet Teji	3.00	P	0.00	
LAWJ	1516	05	Tech Law Scholars Seminar II Mary Dwyer	1.00	IP	0.00	
LAWJ	199	07	Law and Regulation of Drugs, Biologics and Devices Scott Danzis	3.00	A	12.00	
LAWJ	215	08	Constitutional Law II: Individual Rights and Liberties Gary Peller	4.00	A-	14.68	
LAWJ	536	21	Legal Writing Seminar: Theory and Practice for Law Fellows Amy Griffin	3.00	A	12.00	

In Progress:

	EHrs	QHrs	QPts	GPA
Current	14.00	11.00	42.35	3.85
Cumulative	45.00	41.00	152.71	3.72

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	1499	05	Computer Programming for Lawyers: Intermediate	3.00	A	12.00	
LAWJ	1516	05	Tech Law Scholars Seminar II	2.00	P	0.00	
LAWJ	1611	05	Administrative Law and Public Administration Seminar	3.00	A	12.00	
LAWJ	165	07	Evidence	4.00	A	16.00	
LAWJ	536	21	Legal Writing Seminar: Theory and Practice for Law Fellows	3.00	A	12.00	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	15.00	13.00	52.00	4.00
Annual	29.00	24.00	94.35	3.93
Cumulative	60.00	54.00	204.71	3.79

End of Juris Doctor Record

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Ava Kamb for a clerkship in your chambers. Ms. Kamb possesses a unique combination of strengths and characteristics that will make her an outstanding judicial clerk.

I have nearly twenty years of experience teaching legal writing, though this past year was my first at Georgetown. Before I arrived, my future colleagues on the Georgetown faculty selected six students to work with me in their unique and highly competitive Law Fellow Program—one of the six was Ava Kamb. After a year of working closely with Ms. Kamb in this role, which requires a combination of analytical, interpersonal, and organizational skills, I recommend Ms. Kamb for the role of judicial clerk with complete confidence.

Georgetown's year-long Law Fellow Program strikes me as perhaps the best possible training ground for new lawyers-—judicial clerks in particular. Law Fellows are simultaneously students in an advanced seminar on legal writing theory and teaching assistants for a first-year legal writing course. As teaching assistants, Law Fellows supplement my work as professor, researching and analyzing legal issues alongside the first-year students, and offering oral and written feedback to those students under my supervision. As students in the advanced writing seminar, Law Fellows study the theory (and art) of legal writing and the theory (and art) of teaching. The two components of the Law Fellow role require very different sets of skills. I believe that few people could simultaneously excel in each of these challenging roles the way that Ms. Kamb did.

As a teaching assistant for first-year law students, Ms. Kamb was truly exceptional. One reason for her success is her natural ability to relate to others, an intangible quality that cannot be taught. The relationship between student and teacher provides the foundation for any effective learning, and Ms. Kamb intuitively provided that important foundation without any need for direction from me. Her students' proficiency in legal writing varied widely, and she successfully adapted her teaching approach to the needs of each student—a skill that, quite honestly, took me years to master. One student in particular struggled with the analysis in a concerning way. Only due to Ms. Kamb's efforts did we come to understand that the student's fear of failure was the debilitating source of her struggles. Most law students simply would not have had the awareness and patience needed to help this student—Ms. Kamb did. She was neither judgmental nor overly sympathetic; she just provided the steady and specific guidance the student needed. I could provide numerous other examples of Ms. Kamb's talents as a teacher, as this is just one anecdote of many.
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As a student in the seminar, Ms. Kamb was equally impressive. The seminar includes readings on both teaching theory and writing theory—Ms. Kamb was fully immersed in both fields and contributed exceptional insights on both topics. While the typical law student's approach to writing can be utilitarian, Ms. Kamb's approach was anything but. I've never had a writing student as intrigued by the complexities of written legal analysis as Ms. Kamb, nor with as much determination to understand those complexities in order to improve her writing.

Ms. Kamb is soft-spoken and entirely unpretentious. In the competitive law school environment, she distinguishes herself from most of her peers with her quiet confidence. At first, I worried that more forceful law fellows would dominate the team, but I quickly learned that my concern was groundless. Ms. Kamb's contributions to the seminar and her interactions with the first-year students were always exactly on point. She is the sort of team member who can turn the tenor of a conversation with a brief insightful comment. She has no need to be the center of attention yet those around her invariably give her their attention—if she is speaking it is always for good reason

In both contexts, Ms. Kamb repeatedly proved that she is a very strong writer—her written legal analysis is outstanding. While I'm not fond of repeatedly emphasizing my many years of experience, that experience gives me important perspective. To be frank, the top students at good law schools are always strong writers. Ms. Kamb brings something far more valuable—a keen interest in the theory and technique behind successful written legal analysis. She understands that learning how to write well is a long process—one that has only just begun at the end of the first year of law school. She is an excellent writer now, better than most of her peers, and I have no doubt that with every year that disparity will only increase.

I imagine it is extremely difficult to narrow the vast pool of qualified clerkship applicants. I encourage you to look beyond the one-dimensional criteria found in an application and seriously consider Ava Kamb. She is, without a doubt, someone who will not only be a highly successful clerk, but the very best kind of colleague in the small community of judicial chambers.

If I can be of any further assistance, please do not hesitate to call me. I can be reached any time at 574-329-1639.

Amy Griffin - amy.griffin@georgetown.edu

Kind regards,

Amy J. Griffin
Associate Professor of Law, Legal Practice

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Ava Kamb for a clerkship in your chambers. Ava is an impressive and talented student. She is bright and hard-working, and she brings a wealth of experience that will help make her an excellent judicial law clerk.

Ava's training, expertise, and skillset would be especially helpful to a judge hearing cases at the cutting edge of technology or science, as I am well-positioned to understand. I helped many of create Georgetown's programs in Technology Law & Policy, for example serving as the Faculty Director for our Institute for Technology Law & Policy, Center on Privacy and Technology, and masters degree programs in Technology Law. These programs have started to attract talented and credentialed scientists and technologists to our student body such as Ava, who earned a Master of Public Health in Epidemiology before law school.

I met Ava as a student in my unusual course, Computer Programming for Lawyers. Given her prior experience using computer programming and other scientific computing techniques, Ava enrolled in the Intermediate version of the course, which required her to serve as a Teaching Assistant for the beginning students and to develop an independent research project. From observing and advising this work, I can speak with authority about Ava's deep technical expertise and work ethic.

For Ava's final project, she wrote code to gather data from websites to assist the research of my colleague, Professor Neel Sukhatme. Building an app of this complexity required Ava to teach herself several programming techniques and tools she had never used before. She ended up creating a project with a high level of polish and sophistication. Ava's work on this project demonstrated many skills that would serve her well as a judicial law clerk: hard work, attention to detail, creative problem solving, and drive. Furthermore, as a Teaching Assistant, she proved to be organized, compassionate, and a skilled teacher, abilities that would translate well to the camaraderie and teamwork necessary in the close quarters of a chambers. She is a kind and affable person, someone you will be happy to be around.

I suppose this isn't a typical law professor reference letter. I can't comment directly on her legal acumen or lawyering skills, although I think her impressive resume speaks volumes about all of that! I do know, however, that she would make a remarkable law clerk. Through all of my interactions I have had with Ava, I have seen how talented, bright, engaged, affable, and hard-working she is. I think she would thrive in the close quarters of a judge's chambers, and I think she is destined to be a star in whatever setting she is in.

Please contact me if you have any questions.

Sincerely,

Paul Ohm
Professor of Law

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to write this letter in strong support of **Ava Kamb, Georgetown Law '24**, who has applied to you for a clerkship. Ava is a softspoken student with a powerful voice that she uses wisely. She is an excellent writer and clear thinker. I think she will make a wonderful law clerk.

I taught Ava in two classes, a large 1L administrative law course and a smaller writing-intensive seminar on administrative law and public administration during her 2L year. Because she was so quiet and the course so large, I didn't get to know her well during our first time working together (although I recall several pleasant conversations about her interest in health law and FDA regulation, and although she did strong work on the exam, earning an A-).

I got to know Ava much better during the semester she spent in my seminar, and it is here that she really impressed me. While once more she was one of the quieter students in class, during each class session she made one or two points that really helped bring out a key aspect of the reading that had thus far been unacknowledged. She also wrote an excellent paper on the FDA's emerging regulation of artificial intelligence / machine learning devices. This paper was beautifully written, well organized, and perfectly footnoted. I encouraged her to submit it for publication as a Note, and it earned one of only four As in the course. She also wrote a top-notch memo and redline on a classmate's draft, identifying key recommendations for his revision alongside praise for what was working. And she was truly delightful to talk with during our three required 1:1 meetings as she developed her paper from a topic through a draft; she came to each meeting with openness and honesty as she demonstrated hard work and asked important questions about her ideas and process. All of these details convince me that she has what it takes to be a successful law clerk.

In addition, Ava would bring special knowledge about two important fields to your chambers: public health (and health law more generally) and technology. She earned a master's in public health from Columbia University before coming to law school, and she is a technology law and policy scholar here at Georgetown, having earned entry into this selective program as a 1L. She has also done significant coursework in these fields (including in FDA law and computer programming for lawyers) and has pursued practice experience in them through a variety of internships (at HHS, in Congress, at a law firm, and—upcoming during her 3L year—in a clinic). Given the increasing importance of these fields to contemporary litigation, I anticipate that her knowledge and experience would be a boon to chambers.

Ava developed her interest in these areas through a difficult personal connection: her younger sister's long experience with pediatric cancer. Watching her mother act as a dedicated advocate for her sister—navigating complex legal, bureaucratic, and technological arenas—led Ava to want to pursue legal advocacy herself. I have no doubt that Ava's skills, compassion, and discipline will serve her well. I am a big fan, and I think you will be, too. Please don't hesitate to reach out if a conversation would be helpful.

Very truly yours,

Eloise Pasachoff
Agnes Williams Sesquicentennial Professor of Law

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AVA KAMB

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Writing Sample

The following writing sample is a bench memo written for my Law Fellow Seminar course in Spring 2023. The memo examines an issue of Fourth Amendment law regarding seizure and reasonable suspicion. I was provided with a Joint Appendix from a real case with certain identifying details changed. Aside from minor stylistic changes my professor recommended based on a previous draft, the memo is as I submitted it. The memo was originally 22 pages; I have omitted the Table of Authorities, Questions Presented, Brief Answers, Statement of the Case, and Conclusion sections to reduce its length.

DISCUSSION

The Fourth Amendment protects the security of United States citizens by prohibiting "unreasonable searches and seizures" on the part of the government. U.S. Const. amend. IV. Although not every police-citizen interaction constitutes a seizure, an encounter that rises to the level of an investigatory detention is a seizure that must be supported by reasonable suspicion of criminal activity. *See Florida v. Bostick*, 501 U.S. 429, 434 (2002) (describing a "consensual encounter"); *Terry v. Ohio*, 392 U.S. 1, 30 (1968). First, Mr. Johnson was very likely seized when Officers Whitaker and Greer partially blocked his exit from the alley, asked about a no contact order, and held onto his identification card while running a warrants check. Second, the seizure was likely unlawful because there was no reasonable suspicion that the defendant or his passenger was involved in any specific criminal activity, beyond the fact that the seizure took place in a high crime area.

I. Mr. Johnson was seized by the officers prior to the discovery of the firearm.

The interaction between the two officers and Mr. Johnson rose to the level of a Fourth Amendment seizure before the firearm was discovered. A seizure has occurred only if, given the totality of the circumstances, a reasonable person would have believed that he was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). An individual is seized if an officer, "by means of physical force or show of authority," has restrained his or her liberty. *Terry*, 392 U.S. at 19 n.16. This Court considers various factors, including 1) the number of officers present; 2) whether the officers were in uniform and displayed weapons; 3) whether they touched the defendant or attempted to block his departure or restrain his movement; 4) whether the officer's tone was "conversational" or "intimidating"; 5) whether the officer suspected illegal activity or treated the encounter as "routine" in nature; and 6) whether the officer promptly

returned items requested for identification purposes. *United States v. Gray*, 883 F.2d 320, 322 (4th Cir. 1989). If a reasonable person would have felt free to leave, the Court considers the interaction consensual and Fourth Amendment protections do not apply.

Here, given the isolated setting and the officers' unusual behavior, Mr. Johnson was very likely seized by Officers Whitaker and Greer. First, the interaction took place in a darkened, narrow alley early in the morning, when two uniformed and armed police officers parked their patrol cars between Mr. Johnson and the exit. Second, the officers departed from routine practice when they questioned Mr. Johnson about a no contact order and ran a warrants check while holding onto his identification card for several minutes. This behavior would indicate to a reasonable person in Mr. Johnson's position that he is under suspicion of criminal activity and therefore not free to leave.

A. A reasonable person would not feel free to leave when approached by two uniformed and armed police officers in a darkened, narrow alley, where two patrol cars partially block the exit.

Two uniformed officers approached Mr. Johnson in a narrow alley and parked their two patrol cars between Mr. Johnson's vehicle and the exit; this created a setting in which a reasonable person would not feel free to leave. In determining whether there is a sufficient show of authority to constitute a seizure, this Court considers factors such as the number of officers present, whether the officers are in uniform and armed, whether the patrol car's emergency lights or sirens are activated, and whether the officers draw their weapons. *See, e.g.*, *United States v. Stover*, 808 F.3d 991, 997 (4th Cir. 2015) (finding a show of authority where two uniformed officers activated their emergency lights and drew their weapons on the defendant). Given the totality of the circumstances analysis, details such as the time of day and whether the encounter takes place in a public setting are also considered. *See, e.g.*, *United States v. Weaver*, 282 F.3d

302, 312 (4th Cir. 2002) (holding that an encounter that took place in a public parking lot in the middle of the day was consensual, despite the officer being in uniform and armed).

In an encounter that involves police patrol vehicles, a defendant who could easily exit is less likely to be considered seized compared to a defendant whose exit is blocked. *See Stover*, 808 F.3d at 993, 997. A defendant who does not have a "clear path" to exit or whose exit requires driving skill is considered "partially blocked" for the purposes of the seizure analysis. *United States v. Cloud*, 994 F.3d 233, 238 (4th Cir. 2021) (determining that a partial blocking of the defendant by the officers' patrol car contributed to the show of authority). In *Jones*, two uniformed and armed police officers were in a marked patrol car, without their sirens or emergency lights on, when they parked past the defendant's parking spot in the traffic lane of a one-lane driveway. 678 F.3d 293, 297 (4th Cir. 2012). The officers conceded that they had obstructed the defendant from leaving the driveway but believed that they "had no option" but to park in that manner. *Id*. The defendant was nonetheless found to be "effectively" blocked from exiting, because although he could theoretically drive away, he would have to either back the wrong way up the one-way driveway or ask the officers to move their car. *Id.* at 297, 300.

Here, the setting of the encounter supports finding a seizure: Mr. Johnson was in a parked car at the end of a dead-end, darkened alley around 2 a.m. when two police officers, Officer Whitaker and Officer Greer, arrived in separate marked patrol vehicles. Each parked facing Mr. Johnson, and while neither officer activated his emergency lights or sirens, Officer Whitaker's headlights were on, and Officer Greer's directional rear lights were on. Both officers were uniformed and carried holstered firearms. Although the alley was open to the public, only Mr. Johnson and his passenger were present at the early morning hour during which the officers approached them. The encounter between Mr. Johnson and the officers thus took place in a

particularly isolated setting when compared to police-citizen encounters that occur in public, crowded spaces during the day, increasing the likelihood that a reasonable person in Mr. Johnson's position would not feel free to leave.

Furthermore, the two patrol cars were parked in the narrow alley in such a way that Mr. Johnson would have difficulty driving away. The officers deliberately parked a car length away from Mr. Johnson in order to allow him to exit, and there was space for two cars to fit down the alley side by side. Therefore Mr. Johnson was almost certainly not completely blocked in. Yet the officers themselves conceded that the alley was narrow enough that at the end of the encounter, Officer Greer had to move in his vehicle's side mirror so that Office Whitaker could fit by him. Mr. Johnson was likely as restricted as the defendant in *Jones* who was "effectively" blocked from exiting when faced with the choice between driving the wrong way down a one-way street or asking the officers to move their car. Mr. Johnson, parked at the end of a dead-end alley, had only one point of egress. Given the narrowness of the alley, he would likely have had to ask the officers to move their vehicles, or at a minimum to push in their side mirrors. He thus lacked a "clear path" of exit and was at least partially blocked from exiting. Although the officers stated that they entered the alley in their patrol cars rather than on foot due to safety concerns and they may have believed, like the officer in *Jones*, that they had no other option but to park in that manner, the officers nonetheless partially obstructed Mr. Johnson from leaving the alley. Their parking position increased the show of authority.

Therefore, it is likely that a reasonable person approached by two uniformed, armed officers in an isolated alley early in the morning, where the officers' patrol cars are partially blocking the single exit, would not feel free to leave.

B. A reasonable person would not feel free to leave when questioned by officers who departed from routine when they asked about no contact orders and retained the identification card during a warrants check.

The officers' unusual behavior when they asked Mr. Johnson about no contact orders and held onto his ID card while running a warrants check would have likely led a reasonable person to believe that they were under active investigation and therefore not free to leave. Courts consider officer behavior when determining whether an encounter has risen to the level of a seizure. *See Gray*, 883 F.2d 320 at 322. Aggressive police conduct during otherwise normal interactions increases the show of authority, whereas an officer's "polite" or "conversational" tone of voice suggests that an encounter is routine. *Compare Stover*, 808 F.3d at 996–97 (describing officers' conduct as "aggressive" when they activated emergency lights, shined a spotlight on the defendant, and drew their weapons without first asking to speak with him) *with Gray*, 883 F.2d at 322–23 (finding that the officers' tone was "conversational" and implicated a routine encounter rather than a particularized investigation).

However, tone of voice is not determinative if other behaviors suggest that the defendant has been specifically targeted. *See Gray*, 883 F.2d at 323. In *Jones*, two officers followed the defendant's car from a public street down a private driveway. 678 F.3d at 295. Upon exiting the car, and without any preamble, the officers asked the defendant to lift his shirt and consent to a pat down search. *Id.* at 298. Despite the officer's non-threatening tone, the request that the defendant immediately lift his shirt suggested that the interaction was more like a pointed investigation than a routine encounter. *Id.* at 205. The court noted that the officers had deliberately followed the defendant's car from a public street down a driveway and had thus "targeted" him, which constituted a greater show of authority than had the officers approached the defendant in a more casual manner. *Id.* at 300–01 (categorizing the "seemingly routine approach" of an officer as the "hallmark" of a consensual encounter).

In addition, whether the officers hold onto the defendant's identification card while running a warrants check is considered "highly material" for the purposes of a seizure analysis. *Weaver*, 282 F.3d at 310. The District of Columbia Circuit has stated that the retention of a driver's license is determinative in a seizure analysis, and the Fifth Circuit has held that the retention of an alien registration card in an immigration context significantly limits an individual's ability to consent to a search. *Id.* at 313 (citing *United States v. Jordan*, 958 F.2d 1085, 1086 (D.C. Cir. 1992) and *United States v. Chavez-Villarreal*, 3 F.3d 124, 128 (5th Cir. 1993)). In contrast to these sister circuits, in *Weaver*, this Court explicitly declined to establish a bright-line rule that when an officer holds onto an individual's identification card, the individual is seized under the Fourth Amendment. *Weaver*, 282 F.3d at 310. To do so would elevate one factor above all others, contrary to a totality of the circumstances analysis in which no single factor is dispositive in determining a seizure. *Id.* at 313 (citing *Bostick*, 501 U.S. at 437 (holding that "the crucial test [for seizure] is whether, taking into account all of the circumstances surrounding the encounter," the individual is seized).

Instead, retention of an ID must be considered in light of the circumstances. An officer who completely fails to return an identification card indicates that the defendant is not free to leave, as in *Black*, where the officer pinned the defendant's ID to his uniform before continuing on to question other individuals. *United States v. Black*, 707 F.3d 531, 538 (4th Cir. 2013). In contrast, the immediate return of an identification card could itself signify that "business with [the defendant is] completed" and that the defendant is free to leave. *United States v. Lattimore*, 87 F.3d 647, 653 (4th Cir. 1996) (finding a consensual encounter where the officer returned the ID prior to questioning the defendant). The analysis also depends on whether the defendant is on foot or in a car. In *Weaver*, the court distinguished between a routine traffic stop and a situation

in which the defendant, a pedestrian, could have walked away from the encounter with or without his ID. 282 F.3d at 310–11. Because "it is illegal to drive without a license in one's possession," the retention of a driver's license would weigh more heavily towards finding a seizure when the defendant is a driver rather than when the defendant is a pedestrian. *Id.* at 311.

Although a close case, here, Officers Whitaker and Greer likely indicated to Mr. Johnson that he was under suspicion of criminal activity and not free to leave. Despite the officers' friendly demeanor, their actions are more reminiscent of a targeted investigation than a consensual encounter. Notably, the officers did not behave aggressively during the interaction: Officer Whitaker spoke in a friendly tone, began with the greeting, "hi guys," and communicated clearly to Mr. Johnson that the officers were responding to a call from a concerned neighbor. His tone is best described as conversational in nature. Yet other aspects of the interaction suggest that the encounter was non-routine. First, the two officers drove into a dead-end alley at 2 a.m. in two separate patrol cars. Similar to the defendant in *Jones*, who was followed by officers from a public street onto private property, Mr. Johnson likely suspected he was targeted for investigation even before the conversation began—why else would two separate police vehicles track him down at the end of a dead-end alley? Second, after the initial greeting, Officer Whitaker asked Mr. Johnson and his passenger what they were doing, whether they lived nearby, and whether there was an existing no contact order between them. Like the officer in *Jones*, who spoke to the defendant in a non-threatening tone but immediately asked the defendant to lift his shirt, Officer Whitaker appeared friendly but immediately engaged in probing questions related to criminal activity. The questioning would likely lead a reasonable person to believe they are under some form of investigation. Between the targeting of Mr. Johnson and the unprompted

questioning about illegal activity, the interaction between the officers and Mr. Johnson lacks the hallmarks of a routine encounter.

Officer Greer also held onto Mr. Johnson's ID card for several minutes while running the warrants check before returning it. Given that Mr. Johnson was the driver of a car rather than a pedestrian on foot, even the brief retention of his ID card would render him unable to drive away for those moments his ID card was withheld. Mr. Johnson's experience is thus more akin to the driver at a traffic stop who cannot legally drive away without his license than to the pedestrian who can leave on foot. Admittedly, the manner of withholding the ID was not egregious, as unlike the officer in *Black* who pinned the defendant's ID card to his uniform, Officer Greer held onto the ID for a few minutes and had already returned it to Mr. Johnson by the time the firearm was discovered. Nonetheless, although not dispositive given this Court's refusal to adopt a bright-line rule, even the brief retention of this ID weighs slightly toward finding that Mr. Johnson was seized.

The Government, defending the officers' actions, has described their behavior as "almost textbook" except for the brief retention of the ID, and suggests the officers were doing their duty to promote the public safety after a concerned neighbor called. Yet the officers could have taken additional steps to make it clear that the encounter was consensual: they could have told Mr. Johnson that he was free to leave; not questioned him about no contact orders and where he lived; and not run a warrants check, all of which, notwithstanding the officers' friendly tone, likely communicated to Mr. Johnson that he was under suspicion and therefore not free to leave.

Given the isolated setting of the encounter in a darkened, narrow alley early in the morning; the partial blocking of the exit by the officers' two patrol vehicles; the targeting of Mr. Johnson and questioning about no contact orders; and the retention of his ID for several minutes,

it is very likely that, under the totality of the circumstances, Mr. Johnson was seized by the two officers prior to the discovery of the firearm.

II. The officers lacked reasonable suspicion because Mr. Johnson did not behave in a way that indicated furtiveness or criminality, despite his being in a high-crime area late at night.

The seizure of Mr. Johnson was unlawful because the officers failed to articulate reasonable suspicion that Mr. Johnson was engaged in specific criminal activity. To justify an investigatory detention, an officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. Reasonable suspicion is a lower evidentiary threshold than probable cause, and even seemingly innocent facts, when taken together, can create sufficient suspicion for a stop. *United States v. Arvizu*, 534 U.S. 266, 274 (2002). Reasonable suspicion is also an officer-centered analysis where the innocence or suspiciousness of the facts at issue must be assessed with weight given to the officer's on-the-scene judgment. *United States v. McCoy*, 513 F.3d 405, 414 (4th Cir. 2008). Yet officer experience cannot stand in for an absence of articulable facts, and reasonable suspicion must be supported by more than an officer's "inchoate and unparticularized suspicion" or "hunch." *Terry*, 392 U.S. at 27; *McCoy*, 513 F.3d at 415. The standard requires that under the totality of the circumstances, there must be some *objective* manifestation that the individual at issue is, or is about to be, engaged in criminal activity. *United States v. Cortez*, 449 U.S. 411, 417 (1981).

A determination of reasonable suspicion takes into account the circumstances of the encounter, as officers "do not investigate in vacuums, they investigate in settings." *United States v. Bumpers*, 705 F.3d 168, 173 (4th Cir. 1968). Although not dispositive, an individual's presence in a high crime area with frequent criminal activity is highly relevant, because of the

area's "disposition toward criminal activity." *United States v. Sprinkle*, 106 F.3d 613, 617 (4th Cir. 1997) (citing *United States v. Moore*, 817 F.2d 1105, 1007 (4th Cir. 1987)). The time at which the interaction occurred is similarly an important factor, as conduct occurring at a late hour has lower risk of being observed or reported. *United States v. Glover*, 662 F.3d 694, 698 (4th Cir. 2011).

However, "an individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). This Court has cautioned that, even when considered in a totality analysis, an individual's presence in a high crime neighborhood should not be weighted too heavily. *Black*, 707 F.3d at 542. These "high crime neighborhoods" often consist of racial minorities or those dealing with difficult social and economic circumstances. *Id.* To consider that "mere presence in a high crime area at night" justifies a seizure would implicitly assert that the Fourth Amendment provides different levels of protection for different groups of people, a view which this Court has explicitly denounced. *Id.* Thus, there was no reasonable suspicion when an individual was detained at a gas station in a high crime neighborhood at 10 p.m., even though the area was known for armed robberies and violent crimes, the individual did not live in the area, and the officer on the scene thought the individual was involved in drug trafficking. *Id.* at 534–36, 539. The individual was cooperative and did not behave in a way that could arouse particularized suspicion, so the simple fact that the individual was present in a crime-ridden neighborhood could not provide sufficient basis for reasonable suspicion. *Id.* at 535–36, 542.

In addition to personal observations at the scene, officers can rely on information supplied to them through an informant's tip. *Adams v. Williams*, 407 U.S. 143, 147 (1972). The

identity of the tipster can impact the reliability of the tip. *Id.* at 146–47. A tip from an informant the police are familiar with, who has previously provided law enforcement with information in the past, is more reliable than a tip from an anonymous source. *Id.*; *see also Navarette v. California*, 572 U.S. 393, 400–01 (2014) (suggesting that the enhanced reliability comes in part from the ability to hold a known tipster accountable for false reports). A tip from an eyewitness source or a source in "close proximity" to the suspicious individual is considered to have a reliable basis of knowledge. *United States v. Perkins*, 363 F.3d 317, 322 (4th Cir. 2004); *Navarette*, 572 U.S. at 399. Even if the officers do not observe additional suspicious conduct at the scene, a tip that alleges sufficiently specific, dangerous behavior can help furnish reasonable suspicion. *See Navarette*, 572 U.S. at 401–03. For instance, an anonymous caller who described being recently run off the roadway by another driver created sufficient suspicion of ongoing drunk driving, even though the officers following the suspect's car did not observe additional erratic driving, in part because the alleged crime posed an immediate threat to the public. *Id.*

Courts also look to the defendant's nervous or criminal conduct in assessing reasonable suspicion. The reasonable suspicion standard requires that officers be able to point to specific facts that suggest that "criminal activity may be afoot." *Terry*, 392 U.S. at 30. Nervous, evasive behavior and headlong flight are pertinent suspicious factors. *Wardlow*, 528 U.S. at 674. A defendant who undertakes multiple actions characteristic of a specific criminal activity is also likely to generate reasonable suspicion. *See, e.g.*, *McCoy*, 513 F.3d at 412–13 (finding suspicious a defendant who engaged in a series of actions reminiscent of prior drug deals that occurred in the exact same location); *Glover*, 662 F.3d at 695 (finding suspicious a defendant who hid from surveillance cameras while watching the lone station attendant at a gas station); *Bumpers*, 705 F.3d at 170 (finding suspicious a defendant who "matched a pattern of previous trespassing

conduct" when standing behind the dumpster of a shopping center and holding no shopping bags).

The bar for "genuinely" suspicious behavior is higher than only an individual's presence in the vicinity of a crime. *See United States v. Massenburg*, 654 F.3d 480, 491 (4th Cir. 2011). This Court found no reasonable suspicion where officers received an anonymous tip that shots were fired in a high-crime neighborhood and stopped the defendant, who was one of the few individuals in the vicinity of the alleged shots. *Id.* at 482. Noting that the anonymous tip itself was so "vague" as to be scarcely reliable, this Court stated that the officer's claim that the defendant was behaving "nervously" by avoiding eye contact and refusing a pat down was too much of a logical leap to arouse suspicion. *Id.* at 484, 491. Thus, without more evidence of particularized criminal behavior beyond the defendant's presence in the area of the alleged crime, the defendant's detention was not justified by reasonable suspicion. *Id.* at 490.

In Mr. Johnson's case, under the totality of the circumstances, there was likely no reasonable suspicion that could support a seizure. To begin with, the tip, while somewhat reliable because the caller's identity was known to the police, did not allege specific criminal activity that would generate suspicion. The source of the tip was an elderly neighbor who had previously reported suspicious activity to the police and was thus considered trustworthy. The source likely had an eyewitness basis of knowledge, as he described an unfamiliar Monte Carlo parked at the end of a dead-end street with its lights off, and Officers Whitaker and Greer were able to corroborate these details at the scene. But unlike the tip in *Navarette* that alleged drunk driving, or even the "vague" tip in *Massenburg* that alleged that shots were fired, the tipster here did not describe any specific, dangerous behavior that could indicate ongoing criminal activity. The Monte Carlo was unfamiliar to the tipster, who was a resident of the neighborhood, but an

unknown car in a dead-end alley is hardly criminal activity. Thus the tip was only moderately informative for purposes of reasonable suspicion.

That the encounter took place in a high crime neighborhood late at night is relevant to the analysis but not determinative. As described by Officer Whitaker, the area had high levels of gang activity, constant drive-by shootings, prevalent burglaries and vehicle theft, and rampant drug activity. Mr. Johnson was parked in the alley around 2 a.m. The crime-ridden neighborhood might suggest that criminal activities in the area are very likely to occur, and the early morning time might suggest that any such activities are unlikely to be observed and reported. However, the fact that Mr. Johnson was present in a high crime neighborhood at an early hour is by itself insufficient to create reasonable suspicion. To weight too heavily Mr. Johnson's presence in the high-crime neighborhood would contravene this Court's explicit commitment to ensuring that all individuals receive Fourth Amendment protections, including those who live in or near high-crime neighborhoods. Therefore, the location and timing of the encounter does not provide much weight for the reasonable suspicion analysis.

Finally, Officers Whitaker and Greer could not point to any specific actions that indicated Mr. Johnson or his passenger were engaged in ongoing or future criminal activity. Officer Greer testified that he did not see any furtive movements, dazed looks, odor of intoxicants, or suspicious behaviors from either individual. One potentially suspicious factor – that Mr. Johnson's vehicle had no front license plate – was quickly resolved when the officers discovered upon approaching that there was temporary tag on the back window. Beyond that, Mr. Johnson was simply sitting in his car with a friend. The officers had even less evidence of suspicious activity than the officers had in *Massenburg*, where a supposedly nervous individual was found in the vicinity of an alleged crime. Here, the tip articulated no specific crime, and Mr. Johnson

was cooperative and communicative throughout the interaction: he answered the officers' questions about where he lived, explained that he and his passenger were in the alley because they wanted to be alone, and provided the officers with his identification card when asked.

Officers at the scene should be given deference in their assessment of suspicion due to their training and experience, but officer experience cannot stand in for an absence of articulable facts. The analysis could be different here if Mr. Johnson had appeared to be concealing himself, watching the houses around the alley, or behaving erratically, which could indicate potential burglary or trespassing was afoot. Instead, the officers did not articulate any specific, suspicious behavior that could bolster the lack of illegal activity in the tip. Therefore, although reasonable suspicion is admittedly a low bar, there was even less suspicious conduct than in *Massenburg* where this Court found there was no reasonable suspicion.

The bar for reasonable suspicion was likely not met in this case. Without a specific allegation of criminal activity in the reliable tip, or a defendant behaving in a manner that is consistent with criminal activity, there was insufficient evidence of ongoing or future criminal behavior that could support a finding of reasonable suspicion. The officers' on-the-scene assessment and the high-crime setting alone cannot create reasonable suspicion. The officers' seizure of Mr. Johnson was thus unlawful.

Applicant Details

First Name	**Pooja**
Last Name	**Kanabur**
Citizenship Status	**U. S. Citizen**
Email Address	**pkanabur@utexas.edu**
Address	**Address** **Street** **3320 Harmon Ave. Apt 503** **City** **Austin** **State/Territory** **Texas** **Zip** **78705** **Country** **United States**
Contact Phone Number	**9735807134**

Applicant Education

BA/BS From	**Emory University**
Date of BA/BS	**May 2020**
JD/LLB From	**The University of Texas School of Law** **http://www.law.utexas.edu**
Date of JD/LLB	**May 4, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Texas Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Nielsen, Monique
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Rabban, David
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Wood, Lucille
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Pooja Kanabur

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June 12, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a third-year student at The University of Texas School of Law, and I am writing to apply for a 2024-term clerkship in your chambers.

Prior to attending law school, I worked in investment banking. The aspects of banking I enjoyed the most were researching banking regulations and combing through legal documents, so I came to law school with the intent of becoming a transactional attorney. Interning for a state trial court during my 1L summer first sparked my interest in litigation, as I had the opportunity to draft memoranda on legal motions and observe trial proceedings. Working for my school's Disabilities Rights Clinic solidified this interest in litigation. I enjoyed advocating for clients and developing creative solutions to challenging issues. While my experiences as a banker, judicial intern, and clinic student are distinct, together they have allowed me to develop a strong skill set in research, writing, and effective communication. These skills have been invaluable as a law student, and ensure that I will produce analytical, detail-oriented work as a clerk.

My application includes a resume, transcript, and writing sample. Letters of recommendation from Professor David M. Rabban, Professor Lucille D. Wood, and Ms. Monique Nielsen are included as well. These recommenders may be reached as follows:

> Professor David M. Rabban, The University of Texas School of Law
> drabban@law.utexas.edu, 512-232-1308
>
> Professor Lucille D. Wood, The University of Texas School of Law
> lwood@law.utexas.edu, 512-232-2656
>
> Monique Nielsen, Staff Attorney, San Francisco Superior Court
> mnielsen@sftc.org, 415-551-5998

In addition, the Law School's clerkship advisor, Kathleen Overly, is available to answer your questions. You may reach her at koverly@law.utexas.edu or 512-232-1316. Thank you for your consideration.

Respectfully,
Pooja Kanabur

Enclosures

Pooja Kanabur

3320 Harmon Ave., Apt 503, Austin, TX 78705 | pkanabur@utexas.edu | (973) 580-7134

EDUCATION

The University of Texas School of Law, Austin, TX
J.D. expected May 2024
GPA: 3.58/4.0

- TEXAS LAW REVIEW, *Associate Editor, Volume 102 (2023-24)*: Responsible for revising Texas Law Review's Manual on Usage and Style and performing preemption checks on articles.
- Asian Pacific American Law Students Association, *Director of Outreach (May 2022-Present)*
- Women's Law Caucus, *Member (September 2021-Present)*
- Disability Rights Clinic *(January-May 2023)*: Represented students with disabilities in suits brought against school districts. Drafted civil complaints and discovery requests; researched special education and anti-discrimination laws; conducted client interviews; and mediated cases.

Emory University, Goizueta Business School, Atlanta, GA
B.B.A. in Finance received May 2020
GPA: 3.58/4.0

- Emory Indian Cultural Association, *President (2018-19), Executive Board Member (2016-20)*
- The Emory Globe, *Publications Editor (2017-2018), Staff Writer (2016-2017)*
- Goizueta Business School Behavioral Lab, *Research Assistant (August 2019-May 2020)*
- Emory University Office of Student Leadership & Service, *Orientation Leader (August 2017)*
- Emory SaRaas, *Captain (2019-2020)*: nationally competitive Indian dance team

WORK EXPERIENCE

Sidley Austin LLP, New York, NY
Summer Associate May-July 2023 (expected)

- Diversity & Inclusion Scholarship Recipient

San Francisco Superior Court, San Francisco, CA
Judicial Extern to the Honorable Samuel K. Feng, May-July 2022

- Prepared memoranda and provided recommendations to the judge on legal motions including fee waivers, trial continuances, guardian ad litem applications, and requests for service by publication.
- Attended a variety of courtroom proceedings, including civil trials and ex parte hearings.

Mizuho Securities, New York, NY
Investment Banking Analyst, Project Finance, July 2020-June 2021

- Collaborated with clients to identify and execute optimal financing solutions for renewable energy & infrastructure projects.
- Created proposals outlining project details, financing recommendations, and term sheet negotiations.

Investment Banking Summer Analyst, May-August 2019

- Prepared pitch books, company profiles, and market updates for client meetings, with a focus on the Industrials and Consumer & Retail industries.

FIG Partners, Atlanta, GA
Investment Banking Summer Analyst, May-August 2018

- Assisted Mergers & Acquisitions team with researching potential investors, buyers, and acquisition targets; performed market research and valuation analysis.

LANGUAGES & INTERESTS

Languages: Kannada (fluent), Hindi (beginner)
Interests: Trained in 3 forms of Indian dance (Bharatnatyam, Garba-Raas, and Bollywood Fusion); barre; running

Prepared on June 2, 2023

THE UNIVERSITY OF TEXAS SCHOOL OF LAW

UNOFFICIAL TRANSCRIPT PRINTED BY STUDENT

PROGRAM: Juris Doctor

OFFICIAL NAME: KANABUR, POOJA
PREFERRED NAME: Kanabur, Pooja

DEGREE: in progress seeking JD TOT HRS: 58.0 CUM GPA: 3.58

FAL 2021	332R	LEGAL ANALYSIS AND COMM	3.0	A-	KSB
	534	CONSTITUTIONAL LAW I	5.0	B+	LGS
	433	CIVIL PROCEDURE	4.0	A-	TR
	431	PROPERTY	4.0	A	SMJ
SPR 2022	421	CONTRACTS	4.0	B+	AKU
	423	CRIMINAL LAW I	4.0	B+	JEL
	427	TORTS	4.0	B+	TOM
	232S	PERSUASIVE WRTG AND ADV	2.0	A-	LRM
FAL 2022	382G	INTERNATIONAL LAW	3.0	A-	LF
	483	EVIDENCE	4.0	A-	GBS
	385	PROFESSIONAL RESPONSIBI	3.0	B+	FSM
	397S	SMNR: HIGHER EDUCATN &	3.0	A	DMR
	284W	4-ADV LGL WR: TRNSCTNL P/F	2.0	CR	HDN
SPR 2023	381J	NEGOTIATION	3.0	A	JOL
	386T	TRADEMARKS	3.0	B+	EBN
	497C	CLINIC: DISABILITY RIGH P/F	4.0	CR	LDW
	383D	CRIM PROCEDURE: INVESTI	3.0	A-	LK

	HOURS ATTEMPT	HOURS PASSED	EXCLUDE P/F	SEM AVG
FAL 2021	16.0	16.0	16.0	3.65
SPR 2022	30.0	30.0	30.0	3.36
FAL 2022	45.0	45.0	43.0	3.68
SPR 2023	58.0	58.0	52.0	3.67

06-01-2023

EXPLANATION OF TRANSCRIPT CODES

GRADING SYSTEM

LETTER GRADE	GRADE POINTS
A+	4.3
A	4.0
A-	3.7
B+	3.3
B	3.0
B-	2.7
C+	2.3
C	2.0
D	1.7
F	1.3

Effective Fall 2003, the School of Law adopted new grading rules to include a required mean of 3.25-3.35 for all courses other than writing seminars.

Symbols:

Q	Dropped course officially without penalty.
CR	Credit
W	Withdrew officially from The University
X	Incomplete
I	Permanent Incomplete
#	Course taken on pass/fail basis
+	Course offered only on a pass/fail basis
*	First semester of a two semester course

A student must receive a final grade of at least a D to receive credit for the course. To graduate, a student must have a cumulative grade point average of at least 1.90.

COURSE NUMBERING SYSTEM

Courses are designated by three digit numbers. The key to the credit value of a course is the first digit.

101	-	199	One semester hour
201	-	299	Two semester hours
301	-	399	Three semester hours
401	-	499	Four semester hours
501	-	599	Five semester hours
601	-	699	Six semester hours

SCHOLASTIC PROBATION CODES

SP	=	Scholastic probation
CSP	=	Continued on scholastic probation
OSP	=	Off scholastic probation
DFF	=	Dropped for failure
RE	=	Reinstated
EX	=	Expelled

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is a great pleasure to recommend Pooja Kanabur for a clerkship in your chambers. I was Pooja's immediate supervisor in her position as an extern to the Honorable Samuel K. Feng in the summer of 2022. Based on my observations of her work and character, I believe she is a stellar candidate for a judicial clerkship.

Pooja's research, analytical, and written skills are highly developed and on par with the top performers I have supervised over the course of my career. During her internship, Pooja was tasked with analyzing motions, researching and drafting memoranda, and drafting orders for the judge. In each instance Pooja went above and beyond, generating thoughtful and elegant work that addressed precisely what the judge required. Moreover, Pooja was able to work independently on tasks assigned to her and met all of her deadlines with ease. She often submitted work ahead of schedule and was quick to volunteer to take on new assignments. This speaks to Pooja's work ethic and drive to learn.

Pooja was a positive presence in the chambers. She had a professional demeanor and demonstrated a genuine interest in forming connections with those around her. She was enthusiastic about her externship and made an effort to observe a diverse array of proceedings and trials, meet with other judges, and attend courthouse events. Pooja's ability to balance her work with her interest in attending court proceedings demonstrates that she is a well-rounded individual with excellent time-management skills. It is also a testament to her intellectual curiosity, a characteristic I believe will benefit her greatly as a judicial clerk.

I strongly recommend Pooja for a clerkship in your chambers. Please do not hesitate to contact me if you need more information.

Sincerely,

Monique K. Nielsen

Monique K. Nielsen
Staff Attorney
San Francisco Superior Court

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:
I enthusiastically recommend Pooja Kanabur for a clerkship. Pooja was a student in my seminar, Higher Education and the Law, during the Fall 2022 semester. Each student in the class must write a 25-40 page research paper, give an oral presentation of the paper in class and answer questions from other students and from me, and revise the paper in light of my written comments and the comments in class after the oral presentation.

Many students need lots of help in choosing a topic for the research paper. Pooja, by contrast, independently suggested several excellent topics herself and, after discussion with me, picked an especially promising one: “Student Artistic Expression on University Campuses.” Her initial paper was extensively researched, relying on an impressive range of judicial decisions and secondary literature, and was very well written and organized.

Over the years, I have found that students who wrote excellent initial papers have often not devoted sufficient effort to improving them. I recognize that it is very hard to revise a paper that already meets a high standard. But as I tell the students, learning to do so is an important skill for lawyers. Pooja, unlike many students, made significant revisions that substantially improved her excellent paper. Some of these revisions responded to suggestions from me and other students; others reflected her own additional thinking about her topic. In my comments on her initial paper, I asked her to elaborate her statement that it is unclear why the courts have created a distinction between political and nonpolitical art. I was especially impressed that in her revised paper she added an entirely new section about why courts favor political art, which suggested that First Amendment protection should extend to all art.

In addition to substantially improving her paper, Pooja gave an outstanding class presentation, which summarized its contents and major arguments clearly and concisely. She also made very effective class comments on the presentations of the other students. She asked probing questions and made constructive criticisms and suggestions in a thoughtful and helpful way.

Pooja is also a very nice person. It was always a pleasure to talk with her during office hours, and I could tell that the other students respected her. I’m confident that she would work well with others.

Feel free to contact me if you would like me to elaborate these comments or if you have any questions.

Respectfully,

David M. Rabban
Dahr Jamail, Randall Hage Jamail and Robert Lee Jamail Regents Chair
University Distinguished Teaching Professor
The University of Texas School of Law

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to write in support of Pooja Kanabur's clerkship application. As director of the Disabilities Rights Clinic at Texas Law, I had the pleasure of working closely with Pooja over the course of her clinic experience in the spring of 2023. During this time, Pooja demonstrated that she has the drive and skills to succeed as a judicial clerk.

I met Pooja in the fall of 2022 when she volunteered for a disabilities rights pro bono project. I was impressed by how quickly she jumped into her assigned case, despite having no prior experience with disability law. Within a matter of days, Pooja had developed an understanding of the law and created a workable solution for her client. It is this enthusiasm and diligence that makes Pooja stand out as a student.

After observing her work in the pro bono project, I was thrilled when Pooja applied for the semester-long Disabilities Rights Clinic. Pooja showcased the same enthusiasm in the clinic setting. In her first week alone, she took the lead on one case and offered her peers support on another. Over the course of the clinic, Pooja was reliable and always willing to lend a hand to her classmates. She was dedicated to her clients, and they responded well to her kind and professional demeanor. Pooja's eagerness to learn and desire to help others make her a great leader and a supportive teammate.

Pooja demonstrates strong analytical skills and a refined writing style. As a clinic student, Pooja researched and drafted memoranda on disability law, drafted civil complaints and discovery requests, and developed settlement agreements. On several occasions, she carefully combed through hundreds of records to produce concise written work product. Moreover,

Pooja showed initiative in every assignment she was given. She consistently volunteered to take the first pass at drafting. When necessary, she independently sought out examples from previous cases or other clinic resources to guide her. She provided these drafts in a timely manner and was quick to incorporate the feedback I provided.

In short, I highly recommend Pooja for a clerkship in your chambers. Please do not hesitate to contact me if you need more information.

Sincerely,

Lucille D. Wood
Clinical Professor
Founder and Director, INCLUDE Disability Law Project
The University of Texas School of Law

Lucille Wood - lwood@law.utexas.edu

Pooja Kanabur

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WRITING SAMPLE

This writing sample is excerpted from my final paper submitted for my seminar, Higher Education and the Law. I have modified the paper's original structure for this excerpt. In its complete form, Part I analyzes First Amendment protection for the creative and performing arts. Part II outlines government restrictions on artistic expression on public property, focusing on public universities. Part III discusses student academic freedom and university responses to art. Finally, Part IV proposes a new university policy on student artistic freedom. For the purposes of this excerpt, I have omitted Parts II-IV. Instead, this excerpt presents an analysis of the historical context of First Amendment protection of the arts.

Student Artistic Expression on University Campuses: Paving the Way for a New Policy on Artistic Freedom

Pooja Kanabur

Introduction

Art plays a critical role in American society. What is most influential about art, more than its aesthetic appeal or entertainment value, is its power to dismay or offend.[1] Universities in particular have experienced several controversies provoked by student artistic expression. But despite the public university's legal obligation to uphold the First Amendment, many universities opt to hide upsetting artwork rather than grapple with its message.[2] For example, in 2006 Pennsylvania State University canceled the display of a student's ten-piece senior art exhibit titled "Portraits of Terror," which focused on Islamic extremism and criticized violence and bigotry against Israel.[3] In 2016, California State University, Long Beach similarly canceled a play in which Asian-American, Hispanic-American, and African-American student actors sought to promote a dialogue about race relations by sharing personal stories about how the construct of race shaped their lives, while intentionally mocking the stereotypes and slurs that perpetuate racism.[4] The list goes on.[5]

This essay aims to discuss the constitutionality of artistic regulations on university campuses and to propose a new university policy on student artistic expression that protects the interests of student artists. The essay proceeds in four parts. Part I analyzes the historical context

[1] Paul Strohm, *The 1990 Wolf Trap Conference: Academic Freedom and Artistic Expression*, 76 ACADEME 7, 9 (1990).
[2] *"One Man's Vulgarity": Art Censorship on American Campuses*, Foundation for Individual Rights and Expression (July 10, 2018), https://www.thefire.org/research/publications/one-mans-vulgarity-art-censorship-on-american-campuses/one-mans-vulgarity-art-censorship-on-american-campuses-full-text/.
[3] *Id.*
[4] *Id.*
[5] *See id.* (noting examples of university censorship of art).

of First Amendment protection for the creative and performing arts and reveals how, while no court has squarely rejected First Amendment protection for the arts, art is only protected to the extent that it is a vehicle for political or social ideas. Part II discusses what restrictions the government may impose on private expression on public property, as well as how public universities have applied these restrictions in the context of higher education. Part III outlines the current state of student academic freedom and analyzes how universities traditionally respond to conflicts arising between the interests of the university and those of student artists. Finally, Part IV proposes a new university policy on student artistic expression that accounts for students' right to academic freedom.

I. First Amendment Protection of Artistic Expression

The First Amendment guarantees the freedom of expression, which incorporates the freedom of speech, of the press, of association, and of assembly and petition.[6] Yet it does not expressly state any freedom of artistic expression. This Part considers whether the First Amendment protects an artist's creative process and product as fully as it protects the spoken and written word.

A. What is art?

Analysis of First Amendment protection of artistic expression must begin with a rather philosophical question: "What *is* art?" Unfortunately, the answer is unclear and unsatisfying. Courts are generally not comfortable defining art.[7] As Justice Holmes once warned, "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations."[8] Artists are introducing new forms of creative expression

[6] *Freedom of Expression*, American Civil Liberties Union, https://www.aclu.org/other/freedom-expression.
[7] Robert M. O'Neil, *Artistic Freedom and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 177, 178.
[8] *Id.*

and altering the very nature of art, making it more difficult for art critics—let alone judges—to determine what qualifies as art.[9] Though legal scholars and art historians continue to debate "what is art,"[10] in this essay art will be limited to the visual arts (including films, paintings, and sculptures) and the performing arts.

B. Is art protected under the First Amendment?

1. The Supreme Court Established that Art Receives First Amendment Protection

While defining art is difficult and often beyond the scope of legal analysis, the question of whether art is protected under the First Amendment is a much more familiar inquiry.[11] But once again the answer is unclear and unsatisfying. Sources for constitutional protection of artistic expression are sparse because "the Supreme Court has never defined precisely the scope of first amendment protection for the creative and performing arts."[12] The Supreme Court has recognized, at least since 1952, that the arts should receive some First Amendment protection.[13] However, the Court has yet to provide the basis of such protection, or to clarify how much protection art ought to receive.[14] Nevertheless, analyzing the Court's decisions on issues adjacent to artistic expression, including motion pictures and obscenity, provides a glimpse of the Court's views on artistic freedom.

In *Joseph Burstyn, Inc. v. Wilson*,[15] the Supreme Court struck down a New York statute that permitted banning motion pictures for being "sacrilegious," holding that "expression by

[9] *Id.*
[10] *See, e.g.,* Leonard D. DuBoff, *What is Art? Towards a Legal Definition*, 12 HASTINGS COMM. & ENT. L.J. 303 (1990) (discussing statutory definitions of art); Derek Fincham, *How Law Defines Art*, 14 J. MARSHALL REV. INTELL. PROP. L. 314 (2015) (explaining the role the courts play in defining art).
[11] O'Neil, *supra* note 7, at 178.
[12] *Id.*
[13] Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 104 (1996) (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952)).
[14] Hamilton, *supra* note 13, at 105.
[15] 343 U.S. 495 (1952).

means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."[16] The Court explained:

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.[17]

Though the Court does not go so far as to explicitly extend First Amendment protection to all forms of artistic media, it does provide guidelines on the aspects of motion pictures that entitles them to First Amendment protection—they are a "significant medium for the communication of ideas," may "affect public attitudes," and can "espouse political or social doctrine."[18] The Court's commentary suggests any art that has such characteristics is included within the First Amendment guarantee.

Obscenity cases provide additional insight into whether art is protected under the First Amendment. In *Miller v. California*,[19] the Supreme Court upheld the prosecution of a California publisher for the distribution of obscene materials, holding that "serious artistic value" was one of the factors—along with literary, political, and scientific value—that distinguished "obscenity" (which is not protected by the First Amendment) from protected sexual material.[20] Like in *Burstyn*, the Court here alluded to an interest in protecting artistic expression—even if a particular work is patently offensive, it will not be found legally obscene if it has some artistic

[16] *Id.* at 502.
[17] *Id.* at 501.
[18] *Id.*
[19] 413 U.S. 15 (1973).
[20] *Id.* at 26.

value. However, the Court fails to provide guidelines as to what constitutes "serious artistic value."[21]

In *Southeastern Promotions, Ltd. v. Conrad*,[22] the Court came one step closer towards addressing protection of artistic expression. Here, the Court held that a city could not bar a theater group from performing the rock musical "Hair" in a public auditorium merely because the production would not be "in the best interest of the community."[23] In dicta, the Court explained that the city's arbitrary and subjective basis for barring the musical would suffice "[o]nly if [the Court] were to conclude that live drama is unprotected by the First Amendment—or subject to a totally different standard from that applied to other forms of expression."[24] No member of the Court argued that this was the case. However, the Court still stopped short of announcing a rule that all artistic expression was covered by the First Amendment. Instead, the Court placed a limitation on constitutional protection for artistic expression: "Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."[25] While the Court found no reason to hold live drama to a different standard than the spoken or written word, it reserved the right to hold some forms of artistic expression to a different standard.

Together, *Burstyn*, *Miller*, and *Southeastern Promotions* reveal that art is protected under the First Amendment, but not without limitation. Before granting a work protection, courts will ask a follow-up question of whether the art has some value (such as political or artistic value) or serves a purpose (like affecting public attitudes or espousing political doctrine). In most of the

[21] Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WIS. L. REV. 221, 243 (1987).
[22] 420 U.S. 546 (1975).
[23] *Id.* at 548, 556.
[24] *Id.* at 557.
[25] *Id.* (citing Burstyn, 343 U.S. at 502).

cases discussed above, the Court reasoned that artistic expression should be constitutionally protected because it communicated ideas, especially political or social ideas. This is distinct from the standard applied to spoken or written expression, as the Supreme Court has recognized very few categories of unprotected speech.[26]

2. Why Do Courts Favor Political Art?

Analyzing lower court cases highlights that when it comes to art, courts "tend[] to protect art only to the extent that it is a vehicle for ideas, especially political ideas."[27] The state of artistic expression is best summarized by Professor Sheldon H. Nahmod:

> Artistic expression has been assigned a derivative and second class status in the views of many first amendment thinkers, the Supreme Court, and other courts . . . For purposes of first amendment analysis, most commentators consider artistic expression as subservient to, and derivative of, political expression; they determine the first amendment value of artistic expression primarily, if not solely, by its resemblance to political expression.[28]

In other words, the "ideal kind of expression is political discourse, and all other kinds of expression, including artistic expression, are afforded lower degrees of first amendment protection depending on their similarity to political expression."[29] Because a significant number of artworks can be construed as promoting political or social ideas, artistic expression is protected to a certain degree.[30] But there are also many artworks which are nondiscursive and nonpolitical—art for art's sake.[31] These types of art are afforded a lesser degree of protection.

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[26] Edward J. Eberle, *Art as Speech*, 11 U. PA. J.L. & SOC. CHANGE 1, 24-25 (2007) ("The main unprotected categories [of speech] comprise incitement to violence, threat, fighting words, actual malice defamation, child pornography, and obscenity.").
[27] Hamilton, *supra* note 13, at 105.
[28] Nahmod, *supra* note 21, at 222.
[29] *Id.*
[30] Hamilton, *supra* note 13, at 108.
[31] *Id.* at 108-09.

Courts are "undervalue[ing] art by only recognizing its political, rational, discursive potential" and failing to recognize that art may also be nonsensical or a vehicle for self-expression.[32]

Comparing two cases, *Close v. Lederle*[33] and *Sefick v. City of Chicago*,[34] illustrates how courts protect art only to the extent that it is a vehicle for social or political commentary. In *Close*, the court upheld the removal of controversial, sexually-charged paintings from a gallery space in a state university student center.[35] The court found the artist's constitutional interest to be "minimal" because "there [was] no suggestion that . . . [his] art was seeking to express political or social thought."[36] The Court declared that there are "degrees of speech," and that the rights of students to hear speakers, for example, "involve a medium and subject matter entitled to greater protection" than artistic expression.[37] On the other hand, in *Sefick* the court held that a city's revocation of permission for an artist to display his artwork in a civic center was unconstitutional, noting that the work's "social-political content" constituted protected speech under the First Amendment.[38] On their faces, *Close* and *Sefick* are materially similar—both consider the issue of controversial art on public property. Yet the courts came out on opposite sides due to one difference—the artwork in *Sefick* contained "social-political content," and the artwork in *Close* did not.

Turning back to *Burstyn*, the Supreme Court similarly recognized First Amendment protection for motion pictures on the ground that they are "organ[s] of public opinion . . . designed . . . to inform" and have potential for the "direct espousal of a political or social

[32] *Id.* at 106.
[33] 424 F.2d 988 (1970).
[34] 485 F.Supp. 644 (1979).
[35] Close v. Lederle, 424 F.2d 988, 989 (1st Cir. 1970).
[36] *Id.* at 990.
[37] *Id.*
[38] Sefick v. City of Chicago, 485 F. Supp. 644, 648-50 (N.D. Ill. 1979).

doctrine."[39] *Burstyn* and *Sefick* are just two examples of how courts find that "art that conveys a political message or theme stands higher in the constitutional order than art that is 'merely art.'"[40]

The court in *Close* did not provide a clear reason for why an artist's constitutional right is minimal when his work does not seek to express political or social thought. Rather, the court merely claims that there are "degrees" of speech, and that Close's nonpolitical art did not reach the same level of constitutional protection as political speech. Interestingly, the court also rejects the notion that the artwork is protected under obscenity law. Per *Miller*, sexual material is protected under the First Amendment so long as it has artistic value—the artwork need not carry a political message.[41] So even though Close's artwork did not hold any political value, should obscenity law have prevented the work from being removed? Despite agreeing that the work in question was not legally obscene, the court justified its removal, explaining that:

> There are words that are not regarded as obscene, in the constitutional sense, that nevertheless need not be permitted in every context. Words that might properly be employed in a term paper . . . or in a novel . . . take on a very different coloration if they are bellowed over a loudspeaker at a campus rally or appear prominently on a sign posted on a campus tree.[42]

A court's ability to regulate the time, place, and manner of otherwise constitutionally protected artwork will be further discussed in Part II of this essay.

Through the court in *Close* failed to assert why political artwork ought to be entitled to a greater level of constitutional protection than nonpolitical work, other courts have emphasized an important reason for this distinction between political and nonpolitical art—political art better

[39] Burstyn, 343 U.S. at 501.
[40] O'Neil, *supra* note 7, at 181.
[41] Miller, 413 U.S. at 26.
[42] Close, 424 F.2d at 990-91.

achieves the underlying goal of First Amendment freedom of speech, which is the communication of *ideas*.[43] More specifically, the Supreme Court has "long recognized that one of the central purposes of the First Amendment's guarantee of freedom of expression is to protect the dissemination of information" that individuals utilize to "make reasoned decisions about the government."[44] Because sexually explicit or self-expressive art may not "make possible an informed electorate" or "encourage citizens to participate in the political process," courts may be less inclined to protect nonpolitical artistic endeavors. But this is a very one-dimensional view on art, as it fails to recognize the broader role artistic expression plays in society beyond espousing political thought.

If art is protected as "speech" only because it communicates ideas or can be politically effective, we run the risk of associating art's value solely with its function in society, rather than appreciating its independent aesthetic value. Such an approach forces courts to consider the communicative value each piece of art has before it can determine to which level of constitutional protection it is entitled. This is an impracticable task, as it can be nearly impossible to discern an artist's intent with regard to a piece of work. Moreover, it gets dangerously close to what Justice Holmes was trying to avoid—allowing those trained only in the law to judge the value of art.[45]

Some judges disagree with the notion that the First Amendment should protect only political expression. Judge Richard Posner has noted that "freedom of speech . . . protected by the First Amendment has been interpreted to embrace purely artistic as well as political

[43] See, e.g. Bery v. New York, 97 F.3d 689, 695 (2d Cir. 1996) (noting how visual art can promote anti-war sentiments); Barrows v. Municipal Ct., 1 Cal. 3d 821, 824, n.4 (1970) (discussing how the theater can educate its audience on current political events).
[44] *Id.* at 969.
[45] O'Neil, *supra* note 7, at 178.

expression . . . unless the artistic expression is obscene in its legal sense."[46] But he is in the minority. There is a "fairly firm consensus that art that conveys a political message" is protected, while artwork whose merit is "exclusively artistic" or sexually explicit holds less constitutional protection.[47]

Thus while no court has squarely rejected First Amendment protection for the creative and performing arts, artists and constitutional scholars should nevertheless be uncomfortable with the courts' emphasis on the political value of art.[48] Limiting First Amendment protection to political expression would create an "anomaly," as "a political cartoon with modest artistic value or a crude political sculpture would be fully protected, while an internationally recognized work of fine art would not be."[49] Moreover, this distinction suggests that "even the finest and most widely acclaimed work of art makes little or no contribution to civic life" unless it has a political message.[50] Courts should therefore follow Judge Posner's view to more effectively support the constitutional interests of *all* artists, even those whose art does not promote political ideas.

[46] Piarowski v. Ill. Cmty. Coll. Dist. 515, 759 F.2d 625, 628 (7th Cir. 1985).
[47] O'Neil, *supra* note 7, at 181.
[48] *Id.*
[49] *Id.* at 182.
[50] *Id.*

Applicant Details

First Name	**Jennifer**
Middle Initial	**F**
Last Name	**Kaplan**
Citizenship Status	**U. S. Citizen**
Email Address	**jfkaplan@gmail.com**
Address	**Address** Street **79 Potomac Ave SE, Apt 806** City **Washington** State/Territory **District of Columbia** Zip **20003** Country **United States**
Contact Phone Number	**3059625084**

Applicant Education

BA/BS From	**University of Florida**
Date of BA/BS	**May 2010**
JD/LLB From	**The Catholic University of America, Columbus School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=50903&yr=2009**
Date of JD/LLB	**May 19, 2023**
Class Rank	**15%**
Law Review/ Journal	**Yes**
Journal(s)	**The Catholic University Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**National Mock Trial Team**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Letter, Douglas
douglas.letter@mail.house.gov
Fair, Lesley
fairl@cua.edu
Sharifi, John
sharifi@cua.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

79 Potomac Ave SE, Apt 806
Washington, DC 20003

March 23, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a fourth-year, evening division law student at the Catholic University of America, Columbus School of Law in Washington, D.C., and am excited to apply for a judicial clerkship with Your Honor.

As a law student, I have strengthened my research and writing skills, earning top grades in Lawyering Skills, the first-year legal research and writing course, Evidence, and Federal Courts, among others. Complementing my studies, I serve as Editor-in-Chief of the *Catholic University Law Review*, a role which requires problem solving, close attention to detail, organization, and thoughtfulness. In addition, as a member of the school's award-winning National Mock Trial Team, I have improved my oral advocacy skills and developed a deep interest in court proceedings.

During the day, I work full-time as a law clerk in the Office of General Counsel for the U.S. House of Representatives, frequently researching legal issues, drafting documents for litigation, and performing cite checks. In this role, I actively participate in all stages of litigation, from distilling local court rules to filing substantive motions and briefs. Working closely with attorneys to construct persuasive arguments and implement effective litigation strategies, I have further developed my critical thinking, legal writing, and time management skills in a fast-paced, deadline-oriented environment.

You will be receiving letters of recommendation from: Douglas Letter, former General Counsel of the U.S. House of Representatives; John Sharifi, my Evidence professor and National Mock Trial Team coach; and Lesley Fair, my Appellate Advocacy professor. In addition, my resume, a writing sample, and school transcripts are enclosed.

I welcome the opportunity to discuss this position and my qualifications and can be reached at (305) 962-5084 or jfkaplan@gmail.com. Thank you for your time and consideration.

Sincerely,

Jennifer Kaplan

Jennifer Kaplan

JENNIFER F. KAPLAN

jfkaplan@gmail.com | 305-962-5084

EDUCATION

The Catholic University of America, Columbus School of Law, Washington, DC
Juris Doctor, expected May 2023 (Evening Division)
GPA: 3.667 Rank: 4/32
Honors: Full Tuition Scholarship Recipient; Dean's List
Activities: *Catholic University Law Review*
Vol. 72, Editor-in-Chief, 2022-2023
Vol. 71, Staff Editor, 2021-2022
National Mock Trial Team Member, 2020-2023
American Association for Justice Student Trial Advocacy Competition, Regional Finalist, 2021
National Trial Competition, Regional Semi-Finalist, 2021
Dean's Academic Fellow, 2021-2022

University of Chicago, Chicago, IL
Master of Arts in the Social Sciences, August 2011

University of Florida, Gainesville, FL
Bachelor of Arts in Political Science and History, *cum laude*, May 2010
Honors: University Honors Program
Activities: Residential College Advisor; Staff Advisory Board President; Preview Orientation Leader; First Year Florida Peer Leader and Peer Leader Mentor; Florida Alternative Breaks Site Leader

PROFESSIONAL EXPERIENCE

Arnold & Porter Kaye Scholer LLP, Washington, DC
Incoming Associate, 2023
Summer Associate, May 2022 – July 2022
Completed various assignments, including motion and memoranda drafting, cite checking, and legal research; interfaced with attorneys and staff; attended trainings.

Office of General Counsel, United States House of Representatives, Washington, DC
Law Clerk, August 2020 – present (with the exception of May 2022 – July 2022)
Assist attorneys with legal representation of House members, committees, officers, and employees, in addition to matters relating to the institutional interests of the House. Conduct extensive legal research and draft motions, pleadings, and correspondence. Cite check and file legal documents. Work directly with attorneys to prepare for oral arguments and manage litigation calendar. Conduct docket checks and update attorneys on ongoing cases and developments.

Fairfax County Board of Supervisors, Dranesville District Supervisor John Foust, McLean, VA
Staff Aide, January 2016 – August 2020
Managed portfolio of issues and communications for elected official. Represented official at community events and county-wide meetings. Produced and edited e-newsletters, press releases, and talking points. Created social media content.

John Foust for Supervisor Campaign, McLean, VA
Finance Director, March 2015 – November 2015
Raised over $400,000 within six months. Drafted fundraising outreach materials and planned and executed successful fundraising events. Updated and expanded donor network through prospecting, research, and database management.

Democratic Party of Virginia, Leesburg, VA
Field Organizer, July 2014 – November 2014
Conducted voter outreach by contacting more than 1,500 voters per week through phone banks, targeted canvassing, weekends of action, and voter registration drives. Trained over 75 volunteers on effective voter contact techniques.

Teach For America, Paul W. Bryant High School, Tuscaloosa, AL
Science Teacher, June 2012 – June 2014
Provided direct instruction in Chemistry to 10th, 11th, and 12th grade students. Improved student mastery of content through innovative classroom activities and differentiated instruction.

Cascino Vaughan Law Offices, Chicago, IL
Legal Assistant, September 2011 – June 2012
Reviewed case materials and analyzed data to formulate and draft responses to discovery requests. Led document production visits. Trained new employees.

THE CATHOLIC UNIVERSITY OF AMERICA

Unofficial Transcript

Name: **Jennifer Kaplan**
Student ID: **5181064**

Birthdate: 12/25
Print Date: 02/10/2023
Send To:

Beginning of Law Record

Fall 2019 (08/19/2019- 12/18/2019)

Program: School of Law
Major: Law (JD)

Course		Description	Attempted	Earned	Grade	Points
LAW	161	Lawyering Skills I Instructor: Frederick E. Woods	2.000	2.000	A	8.000
LAW	167	Civil Procedure Instructor: Paul Schiff Berman	3.000	3.000	A-	11.010
LAW	179	Contracts Instructor: Heidi M. Schooner	3.000	3.000	A-	11.010
LAW	197	Torts Instructor: Antonio F. Perez	2.000	2.000	B+	6.660

			Attempted	Earned	GPA Units	Points
Term GPA	3.668	Term Totals	10.000	10.000	10.000	36.680
Transfer Term GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined GPA	3.668	Combined Totals	10.000	10.000	10.000	36.680

			Attempted	Earned	GPA Units	Points
Cum GPA	3.668	Cum Totals	10.000	10.000	10.000	36.680
Transfer Cum GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.668	Combined Totals	10.000	10.000	10.000	36.680

Spring 2020 (01/06/2020- 05/11/2020)

Program: School of Law
Major: Law (JD)

Course		Description	Attempted	Earned	Grade	Points
LAW	162	Lawyering Skills II Instructor: Frederick E. Woods	2.000	2.000	A	8.000
LAW	168	Civil Procedure Instructor: Paul Schiff Berman	3.000	3.000	A-	11.010
LAW	180	Contracts Instructor: Heidi M. Schooner	3.000	3.000	A-	11.010
LAW	197B	Torts Instructor: Antonio F. Perez	2.000	2.000	B+	6.660

			Attempted	Earned	GPA Units	Points
Term GPA	3.668	Term Totals	10.000	10.000	10.000	36.680
Transfer Term GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined GPA	3.668	Combined Totals	10.000	10.000	10.000	36.680

			Attempted	Earned	GPA Units	Points
Cum GPA	3.668	Cum Totals	20.000	20.000	20.000	73.360
Transfer Cum GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.668	Combined Totals	20.000	20.000	20.000	73.360

Summer 2020 (05/18/2020- 08/07/2020)

Program: School of Law
Major: Law (JD)

Course		Description	Attempted	Earned	Grade	Points
LAW	483	Evidence Instructor: John N. Sharifi	4.000	4.000	A+	17.320

			Attempted	Earned	GPA Units	Points
Term GPA	4.330	Term Totals	4.000	4.000	4.000	17.320
Transfer Term GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined GPA	4.330	Combined Totals	4.000	4.000	4.000	17.320

			Attempted	Earned	GPA Units	Points
Cum GPA	3.778	Cum Totals	24.000	24.000	24.000	90.680
Transfer Cum GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.778	Combined Totals	24.000	24.000	24.000	90.680

THE CATHOLIC UNIVERSITY OF AMERICA

Unofficial Transcript

Name: **Jennifer Kaplan**
Student ID: **5181064**

Fall 2020 (08/24/2020- 12/21/2020)

Program: School of Law
Major: Law (JD)

Course		Description	Attempted	Earned	Grade	Points
LAW	195	Property Instructor: Roger Paul Colinvaux	4.000	4.000	A	16.000
LAW	271	Constitutional Law I Instructor: Sarah H. Duggin	3.000	3.000	A-	11.010
LAW	535E	Legal Drafting - Legis. Draft Instructor: Evan Frank Instructor: Vincent Gaiani	3.000	3.000	A-	11.010

			Attempted	Earned	GPA Units	Points
Term GPA	3.802	Term Totals	10.000	10.000	10.000	38.020
Transfer Term GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined GPA	3.802	Combined Totals	10.000	10.000	10.000	38.020

			Attempted	Earned	GPA Units	Points
Cum GPA	3.785	Cum Totals	34.000	34.000	34.000	128.700
Transfer Cum GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.785	Combined Totals	34.000	34.000	34.000	128.700

Spring 2021 (01/04/2021- 05/10/2021)

Program: School of Law
Major: Law (JD)

Course		Description	Attempted	Earned	Grade	Points
LAW	272	Constitutional Law II Instructor: Roger C. Hartley	3.000	3.000	B+	9.990
LAW	275	Criminal Law Instructor: Cara H. Drinan	3.000	3.000	B+	9.990
LAW	505	White Collar & Business Crimes Instructor: Stephen Payne	2.000	2.000	A-	7.340
LAW	590	Sports & the Law Instructor: Paul J. Haase	2.000	2.000	A-	7.340

			Attempted	Earned	GPA Units	Points
Term GPA	3.466	Term Totals	10.000	10.000	10.000	34.660
Transfer Term GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined GPA	3.466	Combined Totals	10.000	10.000	10.000	34.660

			Attempted	Earned	GPA Units	Points
Cum GPA	3.713	Cum Totals	44.000	44.000	44.000	163.360
Transfer Cum GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.713	Combined Totals	44.000	44.000	44.000	163.360

Summer 2021 (05/24/2021- 08/06/2021)

Program: School of Law
Major: Law (JD)

Course		Description	Attempted	Earned	Grade	Points
LAW	462	Professional Responsibility Instructor: Lisa Anjou Everhart	3.000	3.000	A	12.000

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	3.000	3.000	3.000	12.000
Transfer Term GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined GPA	4.000	Combined Totals	3.000	3.000	3.000	12.000

			Attempted	Earned	GPA Units	Points
Cum GPA	3.731	Cum Totals	47.000	47.000	47.000	175.360
Transfer Cum GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.731	Combined Totals	47.000	47.000	47.000	175.360

Fall 2021 (08/23/2021- 12/20/2021)

Program: School of Law
Major: Law (JD)

Course		Description	Attempted	Earned	Grade	Points
LAW	427	Election Law Instructor: Troy A. Mccurry	2.000	2.000	B-	5.340
LAW	454	Crim Pro:The Investigative Pro Instructor: James Dietrich	3.000	3.000	A-	11.010
LAW	455	Trusts & Estates Instructor: Lucia Ann Silecchia	4.000	4.000	B+	13.320
LAW	953	Law Journal Wr (Law Review) Instructor: Alonzo G. Harmon	2.000	2.000	P	0.000

THE CATHOLIC UNIVERSITY OF AMERICA

Unofficial Transcript

Name: Jennifer Kaplan
Student ID: 5181064

			Attempted	Earned	GPA Units	Points
Term GPA	3.297	Term Totals	11.000	11.000	9.000	29.670
Transfer Term GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined GPA	3.297	Combined Totals	11.000	11.000	9.000	29.670

			Attempted	Earned	GPA Units	Points
Cum GPA	3.661	Cum Totals	58.000	58.000	56.000	205.030
Transfer Cum GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.661	Combined Totals	58.000	58.000	56.000	205.030

Spring 2022 (01/10/2022- 05/13/2022)

Program: School of Law
Major: Law (JD)

Course		Description	Attempted	Earned	Grade	Points
LAW	206	Corporations Instructor: Sarah H. Duggin	3.000	3.000	A	12.000
LAW	401	Appellate Advocacy Instructor: Lesley Anne Fair	2.000	2.000	A	8.000
LAW	466	Commercial Transactions Instructor: Veryl V. Miles	3.000	3.000	B	9.000
LAW	990	National Trial Team Instructor: John N. Sharifi Instructor: Lindsey Cloud Mervis	2.000	2.000	P	0.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.625	Term Totals	10.000	10.000	8.000	29.000
Transfer Term GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined GPA	3.625	Combined Totals	10.000	10.000	8.000	29.000

			Attempted	Earned	GPA Units	Points
Cum GPA	3.657	Cum Totals	68.000	68.000	64.000	234.030
Transfer Cum GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.657	Combined Totals	68.000	68.000	64.000	234.030

Fall 2022 (08/22/2022- 12/19/2022)

Program: School of Law
Major: Law (JD)

Course		Description	Attempted	Earned	Grade	Points
LAW	587	Legis: Making of a Fed Statute Instructor: Roger Paul Colinvaux	3.000	3.000	A-	11.010
LAW	633	Federal Courts Instructor: Robert Driscoll	2.000	2.000	A	8.000
LAW	955	Law Journal Edit:Law Review II	2.000	0.000		0.000
LAW	990	National Trial Team Instructor: John N. Sharifi Instructor: Lindsey Cloud Mervis	1.000	0.000		0.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.802	Term Totals	8.000	5.000	5.000	19.010
Transfer Term GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined GPA	3.802	Combined Totals	8.000	5.000	5.000	19.010

			Attempted	Earned	GPA Units	Points
Cum GPA	3.667	Cum Totals	76.000	73.000	69.000	253.040
Transfer Cum GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.667	Combined Totals	76.000	73.000	69.000	253.040

Spring 2023 (01/09/2023- 05/12/2023)

Program: School of Law
Major: Law (JD)

Course		Description	Attempted	Earned	Grade	Points
LAW	282	Advanced Evidence Instructor: John N. Sharifi	2.000	0.000		0.000
LAW	407	Conflict of Laws Instructor: Antonio F. Perez	3.000	0.000		0.000
LAW	482	Remedies Instructor: Robert A. Destro	3.000	0.000		0.000
LAW	519	Agency/Partnership Instructor: Kevin C. Walsh	2.000	0.000		0.000
LAW	990	National Trial Team Instructor: John N. Sharifi Instructor: Lindsey Cloud Mervis	1.000	0.000		0.000

THE CATHOLIC UNIVERSITY OF AMERICA

Unofficial Transcript

Name: **Jennifer Kaplan**
Student ID: **5181064**

			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	11.000	0.000	0.000	0.000
Transfer Term GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined GPA	0.000	Combined Totals	11.000	0.000	0.000	0.000

			Attempted	Earned	GPA Units	Points
Cum GPA	3.667	Cum Totals	87.000	73.000	69.000	253.040
Transfer Cum GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.667	Combined Totals	87.000	73.000	69.000	253.040

Law Career Totals

Cum GPA:	3.667	Cum Totals	87.000	73.000	69.000	253.040
Transfer Cum GPA		Transfer/Test/Other Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.667	Combined Totals	87.000	73.000	69.000	253.040

End of Unofficial Transcript

March 23, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I strongly recommend Jennifer Kaplan for a clerkship in your chambers. Ms. Kaplan has worked for me for more than two years, and is a highly intelligent, responsible, and good natured member of my staff.

I am the General Counsel of the United States House of Representatives, and Ms. Kaplan is a law clerk in my office. At all times, I have three law clerks serving with me; they work full-time for me during the day and attend law school in the Washington, D.C. area in the evening. This means that all of my law clerks have to be highly organized, focused, and dedicated individuals (and because of the nature of our work, they often must exercise considerable discretion because they are dealing with important information that must at times be kept confidential.) I have been able to attract superbly qualified law clerks in this way, and they have gone on to federal court clerkships, or positions as associates with very respected law firms in D.C.

These clerks provide invaluable work in my office as we carry out our substantial work of litigating in federal and state courts on behalf of the House of Representatives, its Committees, and its individual Members. The law clerks prepare and file pleadings for me in all levels of the federal courts. They thus perform the traditional work of paralegals in cite checking and proof reading filings, formatting them, and making sure that they comply with all general and local procedural rules. This means that these clerks must be especially skilled at making sure that all of the details have been covered properly.

My law clerks (and Ms. Kaplan in particular) have considerably more responsibilities than these. They also carry out often difficult and complicated legal research on the complex issues of constitutional and statutory law that my office addresses almost daily. They then write memoranda for use by me and the other attorneys in my office in our pleadings. In addition, my law clerks are often tasked with preparing the first drafts of filings or sections of briefs that we then file.

Ms. Kaplan has consistently done this work with immense skill. She performs very thorough legal research (as well as research into the factual records of various matters), and provides it to me and the other attorneys in an extremely useful way through her memos, which are always clear and concise, and completed speedily. Sometimes Ms. Kaplan very helpfully poses questions for further research and analysis, as we wish. From this work, I know that Ms, Kaplan possesses all of the necessary skill to be of great assistance to a busy federal judge.

Perhaps equally important, Ms. Kaplan fits into our office perfectly. She is always pleasant and polite, and displays a healthy sense of humor. And because so much of the litigation work that I do is often accomplished on a highly expedited schedule, Ms. Kaplan and her colleagues are often called upon to work extra hours with little warning, even though they must attend evening classes and complete their law school assignments. To do this successfully requires highly admirable dedication and responsibility.

Moreover, because Ms. Kaplan is now the senior law clerk in my office, she to a certain extent supervises the work of the other law clerks. My sense is that she carries out this responsibility superbly.

The bottom line is that Ms. Kaplan is smart, pleasant, cooperative, and experienced in litigation. She displays all of the traits that will make her a terrific law clerk. I would be happy to orally discuss her strong qualities.

Douglas Letter - douglas.letter@mail.house.gov

CUA

THE CATHOLIC UNIVERSITY OF AMERICA
Columbus School of Law
National Mock Trial Team
Washington, DC 20064-8005

October 13, 2022

RE: Ms. Jennifer Kaplan

Your Honor:

I am the Director of the National Mock Trial Team at The Catholic University of America, Columbus School of Law, where I also teach Evidence. In that capacity, I write to recommend Jennifer Kaplan for employment. Ms. Kaplan is a member of the mock trial team and was also a student in my Evidence class and I've worked with her closely in both settings.

Ms. Kaplan is a highly intelligent, detail oriented, and hard-working aspiring lawyer. I've taught Evidence since 2012. Ms. Kaplan scored higher on her Evidence exam than any student I've ever had. She is also a talented member of our mock trial team and editor-in-chief of law review. I have seen her ability to grasp and decipher complex and nuanced legal issues in short time. She is also friendly, humble, and has a great sense of humor. I have no doubt she would be a tremendous asset in chambers and recommend her without reservation.

If you have any questions, please feel free to contact me.

Sincerely,

John N. Sharifi
Director, National Mock Trial Team
Adjunct Professor of Law

JENNIFER F. KAPLAN

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WRITING SAMPLE

I drafted the attached writing sample for my Appellate Advocacy class in Spring 2022. The assignment required drafting an appellate brief analyzing the legal issues related to an investigatory traffic stop. I conducted all of the research necessary for the assignment. By the assignment's instructions, the brief could not exceed 15 pages.

No. 22-037

IN THE COURT OF APPEALS
STATE OF COLUMBUS

LEONA VALE,

Appellant,

v.

STATE,

Appellee.

ON APPEAL FROM THE CLAYTON COUNTY DISTRICT COURT
(Hon. Norma Ida Reyes, Clayton County District Court Judge)

BRIEF FOR THE APPELLANT

Jennifer Kaplan
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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the Clayton County District Court. Leona Vale filed her Notice of Appeal on December 16, 2021, making the appeal timely under 17 Columbus Criminal Code § 2107. This Court has jurisdiction pursuant to 17 Columbus Criminal Code § 1290.

STATEMENT OF THE ISSUE

I. WHETHER DEPUTY MAYHEW LACKED THE REQUISITE REASONABLE ARTICULABLE SUSPICION BASED SOLELY ON MS. VALE'S ALLEGED CELL PHONE USE TO CONDUCT AN INVESTIGATORY TRAFFIC STOP IN A JURISDICTION WHERE CERTAIN CELL PHONE USES ARE PERMITTED WHILE DRIVING.

STATEMENT OF THE CASE

A. Proceedings Below

On April 6, 2021, a Clayton County Grand Jury indicted Leona Vale for possession of the controlled substance oxycodone, in violation of Columbus Criminal Code § 708. R. at 2. Ms. Vale moved to suppress the evidence of oxycodone seized by the Clayton County Sheriff's Department, on the grounds that it was found during an illegal traffic stop that was made without the requisite reasonable articulable suspicion. R. at 6. After testimony and briefing from each party, Clayton County District Court Judge Norma Ida Reyes denied Ms. Vale's motion to suppress. R. at 24-26. Ms. Vale entered a conditional plea of guilty to one count of violating Columbus Criminal Code § 708, reserving the right to appeal to this Court the denial of her Motion to Suppress Illegally Seized Evidence. R. at 28. The district court accepted Ms. Vale's conditional plea and Ms. Vale filed a timely Notice of Appeal on December 16, 2021. R. at 28, 32.

B. Statement of the Facts

Understanding the pervasiveness of cell phone use in Columbus and considering the important functions cell phones provide, the Columbus Legislature enacted Columbus Criminal Code § 496 to prohibit some uses of cell phones while driving while expressly allowing motorists to use cell phones for other specific purposes. R. at 3. Section 496 prohibits "use [of] a hand-held electronic communication device to write, send, access, or view an electronic message or image while driving a motor vehicle," unless hands-free technology is used, but permits drivers to "access, use, or view a global positioning system or navigation system," to view "safety-related information," and to "activate or deactivate voice-operated or hands-free technology." R. at 3.

On Friday, March 19, 2021, Leona Vale was driving north in the right lane of Lancaster Avenue in Claytonville around 9:00 p.m. R. at 7. Next to her, in the left lane, were two members of the Clayton County Sheriff's Department, Deputy Micah Mayhew and Deputy Selena Ibrahim. R. at 7. The Deputy Sheriffs were on duty, looking for signs of impaired driving. R. at 7. Deputy Mayhew testified that Ms. Vale was not driving erratically, weaving, or speeding. R. at 12. Ms. Vale was driving a late model Audi TT, which has an infotainment screen, capable of emitting light, in the center console. R. at 13. Deputy Mayhew testified that he saw what appeared to be a light coming from the inside of Ms. Vale's vehicle. R. at 7.

After coming to a complete stop at a red light at the intersection of Lancaster Avenue and Detrick Boulevard, Deputy Mayhew testified that he saw Ms. Vale "holding a cell phone and looking down at it" and "manipulating the screen with her finger for about 15 seconds" while stopped. R. at 8. Deputy Mayhew testified that what he observed was consistent with

how he "noticed that some people type on a cell phone[.]" R. at 8. However, he could not see what, if anything, was on Ms. Vale's cell phone screen. R. at 14, 15. In addition, the cell phone was never analyzed to determine how it was being used at the time. R. at 12.

Once the traffic signal turned green, Ms. Vale continued north on Lancaster Avenue. R. at 8. At this point, the Deputy Sheriffs activated the lights on their vehicle and Ms. Vale immediately pulled over onto the shoulder of the road in response. R. at 8. When Deputy Mayhew approached Ms. Vale's vehicle and identified himself, Ms. Vale provided her license and registration. R. at 8. While stopped, Deputy Mayhew scanned the inside of Ms. Vale's vehicle and saw a cell phone on the dashboard. R. at 9. He also saw that there was "an opened amber plastic container with a white lid next to it[,] . . . six oval-shaped green tablets and three small packets of what appeared to be white powder wrapped in plastic wrap." R. at 9. Deputy Mayhew later testified that he believed the appearance of the items was consistent with the controlled substance oxycodone. R. at 10. The Deputy Sheriffs called for back-up and placed Ms. Vale under arrest. R. at 10. Forensic analysis of the tablets and white power confirmed that both were oxycodone in varying dosages. R. at 11. Following her arrest, Ms. Vale consented to breath and blood tests. R. at 10. The tests indicated that "there was zero presence in her system of alcohol, marijuana, oxycodone, methadone, or any other intoxicating substance, controlled substance, or illegal drug." R. at 12.

Ms. Vale moved to suppress the items found in her car, urging that Deputy Mayhew lacked the requisite reasonable articulable suspicion to conduct the traffic stop based solely on his observations of her alleged cell phone use while driving. R. at 6, 19. The Clayton County District Court denied the motion to suppress. R. at 24-26.

SUMMARY OF THE ARGUMENT

Deputy Mayhew's investigatory stop violated the Fourth Amendment and infringed upon Ms. Vale's constitutionally protected privacy interests because it was not supported by reasonable articulable suspicion. Therefore, the decision of the Clayton County District Court denying Ms. Vale's Motion to Suppress Illegally Seized Evidence must be reversed. First, because the Columbus Criminal Code permits certain cell phone uses while driving, Detective Mayhew's observation of Ms. Vale allegedly handling or manipulating her cell phone while driving cannot provide the "particularized and objective basis" necessary for reasonable suspicion. *See Kansas v. Glover*, 140 S. Ct. 1183, 1187 (2020). Second, as other state and federal courts have concluded in evaluating similar statutes, a police officer's mere observation of cell phone use does not establish a sufficient probability of criminal activity, necessary for a finding of reasonable articulable suspicion. Third, applying the reasonable articulable suspicion standard so broadly as to allow the police to pull over a driver upon the mere observation of cell phone use, frustrates the legislative intent behind section 496 of the Columbus Criminal Code, which expressly authorizes motorists to use cell phones for certain purposes while driving. Given the constitutional interests at stake, this Court should reverse the trial court's decision and suppress any evidence seized in violation of Ms. Vale's Fourth Amendment rights.

STANDARD OF REVIEW

Courts apply a "two-tier standard of review" when considering a district court's denial of a motion to suppress. *United States v. Chavez-Villarreal*, 3 F.3d 124, 126 (5th Cir. 1993). The district court's legal determinations are reviewed *de novo* and its factual findings are reviewed for clear error. *United States v. Branch*, 537 F.3d 328, 337 (4th Cir. 2008).

ARGUMENT

I. BASED SOLELY ON MS. VALE'S ALLEGED CELL PHONE USE, DEPUTY MAYHEW LACKED THE REQUISITE REASONABLE ARTICULABLE SUSPICION TO CONDUCT AN INVESTIGATORY STOP IN A JURISDICTION WHERE CERTAIN CELL PHONE USES ARE PERMITTED WHILE DRIVING.

Because an investigatory stop conducted without the requisite reasonable articulable suspicion infringes upon constitutionally protected privacy interests, Deputy Mayhew's investigatory stop of Ms. Vale's car violated her Fourth Amendment rights. Three considerations demonstrate the unconstitutionality of the stop. First, because the Columbus Criminal Code permits certain uses of hand-held devices while driving, police observation of a driver merely handling or manipulating a cellphone while driving is insufficient to provide the "particularized and objective basis" necessary for reasonable suspicion. *See Glover*, 140 S. Ct. at 1187. Second, in evaluating similar criminal statutes, other state and federal courts have concluded that a police officer's mere observation of cell phone use does not establish a sufficient probability of criminal activity, necessary to a finding of reasonable articulable suspicion. Third, in a jurisdiction in which the Legislature has expressly authorized motorists to use cell phones for certain purposes while driving, applying the reasonable articulable suspicion standard so broadly as to allow the police to pull over a driver upon the mere observation of cell phone use, frustrates the legislative intent behind section 496 of the Columbus Criminal Code. Accordingly, this Court should reverse the decision of the Clayton County District Court and suppress any evidence seized in violation of Ms. Vale's Fourth Amendment rights.

A. Because the Columbus Criminal Code permits certain uses of hand-held devices, police observation of a driver merely handling or manipulating a cell phone while driving is insufficient to provide the "particularized and objective basis" necessary for reasonable suspicion.

The Fourth Amendment permits a brief investigative traffic stop when a law enforcement officer has reasonable suspicion that the person stopped is engaging in criminal activity. *Glover*, 140 S. Ct. at 1187. Critically, "[a] citizen's right to be free from traffic stops based on less than reasonable suspicion is a clearly established right." *Smith v. Williams*, 78 F.3d 585, 1996 WL 99329, at *6 (6th Cir. 1996) (table). Reasonable suspicion must be supported by "a particularized and objective basis." *Glover*, 140 S. Ct. at 1187 (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). Whether a particular stop is reasonable depends on "the totality of the circumstances—the whole picture—must be taken into account." *Cortez*, 449 U.S. at 417. Relying on a mere hunch is insufficient. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). Rather, "[o]fficers must point to 'specific and articulable facts' that suggest unlawful conduct." *Crigger v. McIntosh*, 254 F. Supp. 3d 891, 898 (E.D. Ky. 2017) (quoting *Terry*, 392 U.S. at 21).

Columbus Criminal Code § 496 permits most uses of cell phones will driving. It forbids only the use of a cell phone to "write, send, access, or view an electronic message or image" while driving. R. at 3. However, even these uses are permitted if they are accomplished using "voice-operated or hands-free technology." R. at 3. In addition, all other uses of cellphones by drivers are allowed, including to "access, use, or view a global positioning system or navigation system," to view "safety-related information," and to "activate or deactivate voice-operated or hands-free technology." R. at 3. At the evidentiary hearing before the trial court, Deputy Mayhew admitted that he could not tell for what purpose Ms. Vale was using her cell phone, could not see what, if anything, was on the screen of her cell phone, and that the cell phone was never analyzed to determine if any alleged use was lawful. R. at 12, 14, 15. Moreover, Deputy

Mayhew agreed that the car Ms. Vale was driving, an Audi TT, had an infotainment screen capable of emitting light, which could cause a glow in the interior of the car. R. at 13.

This, however, is not even the full extent of the circumstances under which Deputy Mayhew conducted his investigatory stop. Deputy Mayhew also testified that Ms. Vale was not driving erratically, weaving, or speeding and that she pulled over immediately and complied with his requests without issue. R. at 12, 8. Thus, because Deputy Mayhew had no way of knowing whether Ms. Vale was using her cell phone for a permitted use, or even whether she was using it at all, when considering the totality of the circumstances, the traffic stop at issue was unreasonable.

In addition, any alleged use did not constitute the requisite particularized and objective basis for reasonable suspicion. Here, Deputy Mayhew testified that he saw Ms. Vale "holding a cell phone and looking down at it" and "manipulating the screen with her finger for about 15 seconds" while stopped at an intersection. R. at 8. These facts are similar to those in *Crigger v. McIntosh*, in which a deputy sheriff observed a driver with one hand on the wheel, "doing something on his cell phone with the other hand." *Crigger*, 254 F. Supp. 3d at 895. There, the court determined that "'[u]sing' or 'doing something' with a cell phone while driving does not constitute a particularized and objective basis for suspecting that a violation" of the statute at issue, which prohibited texting while driving, had occurred. *Id.* at 898-99. Therefore, without more, Deputy Mayhew's limited observations did not constitute a sufficient basis for conducting an investigatory stop. As a result, the stop was illegal, and any evidence seized was in violation of Ms. Vale's Fourth Amendment rights and should have been suppressed. *See Mapp v. Ohio*, 367 U.S. 643, 649 (1961).

B. Other courts that have evaluated similar criminal statutes have agreed that mere observation of alleged cell phone use is insufficient to establish a sufficient probability of criminal activity, necessary to a finding of reasonable articulable suspicion.

Reasonable suspicion requires an assessment of the probability that an individual is engaged in criminal activity. *Cortez*, 449 U.S. at 418. In this case, Deputy Mayhew's observation of Ms. Vale's alleged cell phone use did not establish a sufficient probability of criminal activity to justify a finding of reasonable suspicion. In *United States v. Paniagua-Garcia*, after reviewing similar facts, the United States Court of Appeals for the Seventh Circuit agreed that "a mere possibility of unlawful use" is insufficient to create a reasonable suspicion of a criminal act. 813 F.3d 1013, 1014-15 (7th Cir. 2016). There, an Indiana police officer pulled over a driver after seeing the driver holding and manipulating a cell phone, with his head bent towards it. *Id.* at 1014. Like the law at issue before this Court, the Indiana law did not prohibit all cell phone use while driving. Instead, the Indiana statute prohibited "'texting' . . . or emailing while operating a motor vehicle" but permitted "[a]ll other uses of cellphones by drivers." *Id.* at 1013. The Seventh Circuit held that the officer lacked reasonable suspicion because the observed behavior was consistent with lawful cell phone use. *Id.* at 1014-15. Moreover, the officer could not "explain[] what created the appearance of texting as distinct from any one of the multiple other—lawful—uses of a cellphone by a driver." *Id.* at 1014.

The Seventh Circuit's persuasive rationale in *Paniagua-Garcia* demonstrates the weakness in the State's argument in the case before this Court. Here, Deputy Mayhew failed to explain how the appearance of Ms. Vale "holding the phone in her left hand . . . typing on the screen with the extended index finger of her right hand," created the appearance of unlawful cell phone use. *See* R. at 8. At most, he testified that what he observed was consistent with how he "noticed that some people type on a cell phone[,]" *id.,* but he "couldn't actually see what was on

her screen." R. at 15. Because the cell phone uses permitted by the Columbus Criminal Code may involve typing, even if Deputy Mayhew's observations were consistent with how he has seen people type on a cell phone previously, they are insufficient indicia of unlawful conduct. "Reasonable suspicion of a criminal act" requires more than "a mere possibility of unlawful use." *Paniagua-Garcia*, 813 F.3d at 1014. Therefore, because Deputy Mayhew was unable to differentiate between lawful and unlawful cell phone use, he lacked reasonable articulable suspicion based on an insufficient probability of criminality.

Other courts have similarly found that an officer lacked reasonable suspicion to conduct an investigatory stop when there was a lack of apparent criminality. For example, in *State v. Morsette*, the North Dakota Supreme Court rejected the same argument that the State proffers here. In *Morsette*, an officer, while "stopped at a red light, observed a driver in the adjacent lane manipulating his touchscreen cell phone for approximately two seconds" and saw him "tap approximately ten times on the illuminated cell phone screen." 924 N.W.2d 434, 436 (N.D. 2019). The Court concluded that "[a]lthough [the officer] testified to observing the screen's illumination and finger-to-phone tapping, there is absent a link between those observations and an objectively reasonable basis to suspect a violation." *Morsette*, 924 N.W.2d at 440. The Court also noted that the State failed to elicit testimony regarding the officer's unique training or success rate at identifying violations of the relevant law prohibiting certain cell phone use while driving. *Id.*

Like the facts at issue in *Morsette*, in the case before this Court, Deputy Mayhew testified that he saw Ms. Vale "holding the phone in her left hand . . . typing on the screen with the extended index finger of her right hand," and "manipulating the screen for about 15 seconds." R. at 8. Deputy Mayhew testified only that what he observed was consistent with how he "noticed

that some people type on a cell phone," R. at 8, but that he "couldn't actually see what was on her screen." R. at 15. This testimony is insufficient to show a probability that Ms. Vale's alleged use of her cell phone was unlawful. Thus, the investigatory stop was unconstitutional, and any evidence seized in violation of Ms. Vale's Fourth Amendment rights should have been suppressed.

The State mistakenly relies on *State v. Dalton*, 850 S.E.2d 560 (N.C. Ct. App. 2020), but the facts in that case demonstrate why the holding is inapplicable here. There, a police officer observed a glow coming from within a vehicle traveling on a road and could see that the driver, the defendant in that case, was holding a phone and appeared to be texting. *Dalton*, 850 S.E.2d at 562. After the officer stopped the vehicle, the defendant told the officer that he was using the phone's "maps" application and voluntarily presented his phone to the officer to confirm. *Id.* The officer testified that "immediately as soon as he turned his phone on, it was on a texting screen." *Id.* The North Carolina Court of Appeals affirmed the trial court's ruling denying the defendant's motion to suppress. *Id.* at 567.

This Court should reject the State's attempt to liken this case to *Dalton*. Unlike the officer in *Dalton*, Deputy Mayhew admitted that he could not tell for what purpose Ms. Vale was using her cell phone, could not see what, if anything, was on the screen of her cell phone, and at no point made any effort to confirm if, or how, Ms. Vale was using her phone prior to being stopped. R. at 14, 15. Moreover, the cell phone was never analyzed to determine if any alleged use was lawful. R. at 12. The State's mistaken reliance on an assumption of illegal conduct rather than evidence of such in arguing that the investigatory stop at issue was supported by reasonable articulable suspicion should not be excused. Because Deputy Mayhew lacked the

requisite reasonable articulable suspicion when he conducted the investigatory stop of Ms. Vale, any evidence seized should have been suppressed.

C. In a jurisdiction in which the Legislature has expressly authorized motorists to use cell phones for certain purposes while driving, applying the reasonable articulable suspicion standard so broadly as to allow the police to pull over a driver upon the mere observation of cell phone use, frustrates the legislative intent behind the Columbus Criminal Code.

Relying on *State v. Struve*, the State erroneously argues that requiring additional information before law enforcement officers initiate investigatory traffic stops would "place[] too heavy a burden on the police." 956 N.W.2d 90, 101-02 (Iowa 2021). In that case, the Supreme Court of Iowa affirmed the denial of a motion to suppress by a vote of 4-3, over a vigorous dissent. This Court should not accept the State's invitation to permit officers to conduct investigatory stops without the requisite reasonable articulable suspicion. Doing so not only frustrates the legislative intent behind the Columbus Criminal Code, but it also threatens the fundamental constitutional protections of the Fourth Amendment.

The Columbus Legislature made a deliberate choice to prohibit some uses of cell phones while driving, but to allow others. This legislative choice necessitates a showing of reasonable suspicion beyond mere observation of a driver holding and manipulating a cell phone, for an officer to constitutionally conduct an investigatory stop. "A suspicion so broad that it would permit the police to stop a substantial portion of the lawfully driving public," particularly in a jurisdiction where not all cell phone use while driving is prohibited, "is not reasonable." *Paniagua-Garcia*, 813 F.3d at 1014-15 (quoting *United States v. Flores*, 798 F.3d 645, 649 (7th Cir. 2015).

Understanding that cell phones are "a pervasive and insistent part of daily life," *Riley v. California*, 573 U.S. 373, 385 (2014), the Columbus Criminal Code explicitly provides for

lawful uses of cell phones and other hand-held electronic devices while driving. Specifically, rather than ban all cell phone use, the Columbus Criminal Code prohibits texting or emailing while driving, unless hands-free technology is used, but authorizes motorists to use a navigation system, to view safety-related information, and to activate or deactivate voice-operated or hands-free technology. R. at 3. Thus, allowing the police to pull over a driver upon the mere observation of cell phone use would contravene the plain language of the Columbus Criminal Code and the intent of the Legislature. Upholding the district court's denial of Ms. Vale's motion to suppress effectively results in the unjust scenario presented by the dissent in *Struve*, in which "the legislature might as well have said the following: 'Drivers: go ahead and use your phones for the uses we've permitted you. Police: pull them over and interrogate them if they do.'" 956 N.W. 2d at 106 (McDermott, J., dissenting).

The State misapplies the Supreme Court jurisprudence that officers must be permitted "to make commonsense judgments and inferences about human behavior," *Glover*, 140 S. Ct. at 1188 (internal quotation marks and citation omitted), because Deputy Mayhew lacked sufficient information or particularized knowledge to make such a judgment. Referencing *Glover*, the district court held that Deputy Mayhew's "commonsense judgments and inferences" were consistent with those that a reasonable officer would make under the same circumstances and thus were sufficient to constitute reasonable suspicion. R. at 25. Here, however, the State has failed to provide any support for the assertion that Deputy Mayhew reasonably relied on commonsense judgments or that any such judgments would be consistent with those of a reasonable officer.

In addition, rather than consider the legislative purpose behind the Columbus Criminal Code, the district court relied on vague empirical data, uncited by either party, to support its

decision. R. at 25 ("The number of fatal crashes in which cell phone use is implicated has reached a shocking level."). Even considering the important goal of keeping roadways safe, the "standardless and unconstrained discretion" promoted by the State "is the evil" the Supreme Court has identified in cases involving officer discretion. *Delaware v. Prouse*, 440 U.S. 648, 661 (1979). "[T]he discretion of the official in the field [must] be circumscribed, at least to some extent." *Id.*

Accordingly, recognizing the legislative intent behind the Columbus Criminal Code, this Court should reverse the decision of the Clayton County District Court and suppress any evidence seized in violation of Ms. Vale's Fourth Amendment rights.

CONCLUSION

For the foregoing reasons, Appellant Leona Vale asks this Court to reverse the ruling of the Clayton County District Court denying her motion to suppress.

Respectfully submitted,

/s/ Jennifer Kaplan
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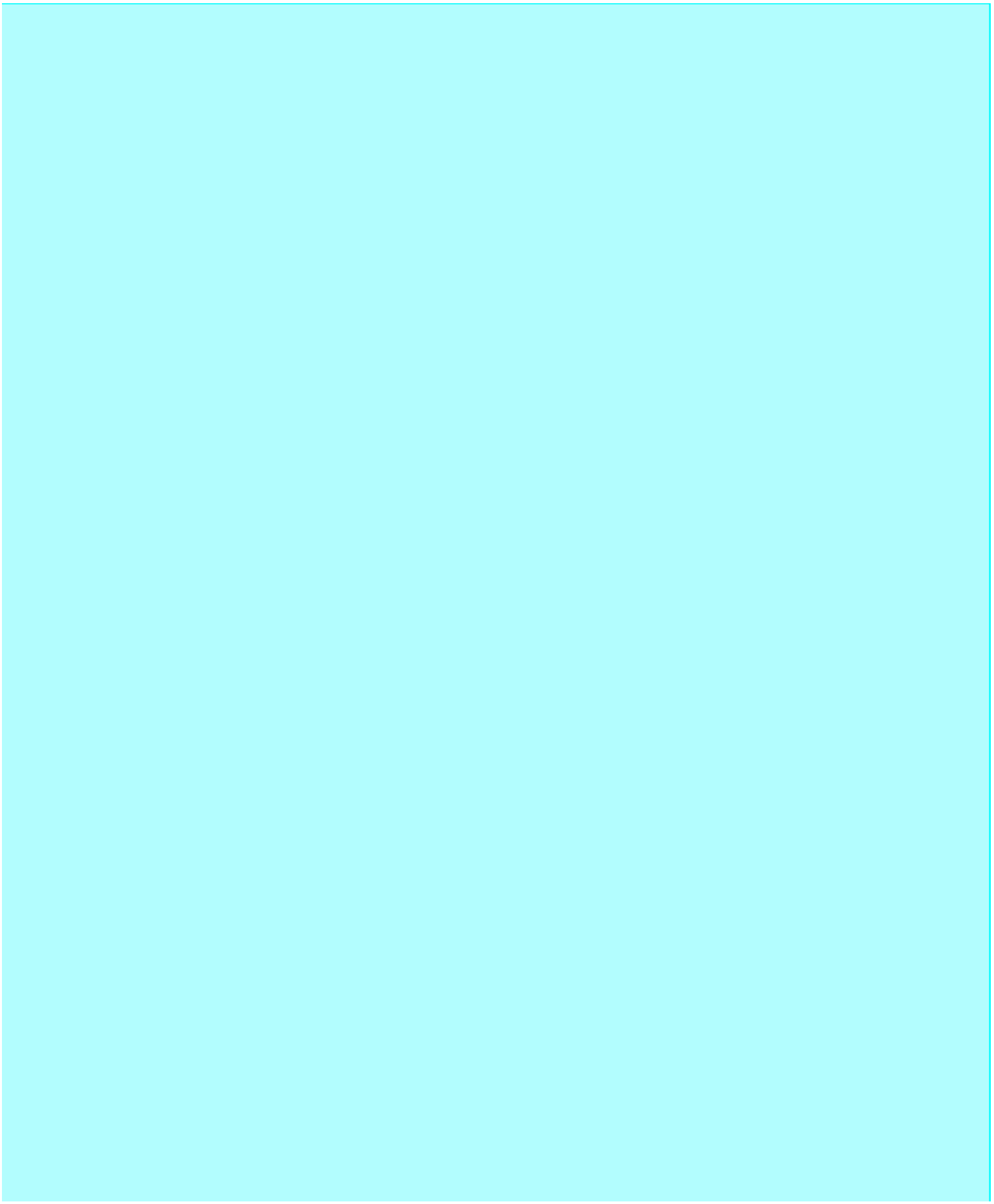
DATED: April 5, 2022



Applicant Details

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Applicant Education

BA/BS From	**Willamette University**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Oregon School of Law** **http://www.law.uoregon.edu/**
Date of JD/LLB	**May 18, 2024**
Class Rank	**33%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**University of Oregon School of Law Moot Court** **American Bar Association Arbitration Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships **Yes**
Post-graduate Judicial Law Clerk **No**

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June 9, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a rising 3L at the University of Oregon School of Law, and I seek your term clerk position starting in August 2024. I built a background in public service through legislative and legal work. Two years ago, I was a full-time legislative assistant to Oregon Senate President Rob Wagner. In that role, I advanced policy issues for the Senate Majority Office by collaborating with legislators, attending lobby meetings, and addressing constituent concerns for the Senator. By serving constituents and working on public policy, I found my passion for serving the public.

At Legal Aid Services of Oregon last year, I helped domestic violence victims secure protective orders against their abusers. I pushed landlords to reverse their eviction notices, keeping tenants housed. I represented a claimant at an administrative law hearing to earn an indigent client the benefits she needed. I loved using the law to aid the people who must use our courts the most.

While externing with Federal Magistrate Judge Mustafa Kasubhai, I discovered a new passion. I felt joy when drafting opinions because I was participating in building the meaning of the law. I loved every aspect of my work, from diving deep into evidentiary records to find the truth of what happened, to pondering case law to determine the exact meaning of legal ideas, to weighing opposing arguments to identify their strengths and weaknesses. I enjoyed the process of drafting opinions, especially editing my writing to make it logical, concise, and uniform. Every day, I woke up excited to work at the Federal District Court. Because I am passionate about writing, exploring various areas of law, and finding solutions to help people, I will thrive as a law clerk.

I am passionate about justice and writing the law. This summer, I am helping the Oregon Secretary of State's office rewrite the rules for administering Oregon elections. In the past, I have presented structural government reforms to a state legislative committee, and I advocated for antiracist education requirements in Oregon. I chose public service as a legislative assistant, a legal aid clerk, a judicial extern, an elections law clerk, and soon as an extern with the District of Oregon's Federal Public Defender this fall. I hope to help administer justice as your term clerk.

Thank you for your consideration.

Sincerely,

Aleesha Kazi

Aleesha Kazi

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EDUCATION

Juris Doctor, University of Oregon School of Law — Expected May 2024
Wayne Morse Center for Law & Politics Legal Fellow (2023-2024) — Eugene, OR
ABA Moot Court Competitor – Arbitration Team 2022
Asian & Pacific American Law Student Association Co-Director (2022-2023)
Multnomah Bar Association Fellow (2021-2022)

Bachelor of Arts in Politics, Policy, Law & Ethics, Willamette University — May 2021
cum laude, Phi Beta Kappa, Minor in Philosophy, Senior Key Recipient — Salem, OR

EXPERIENCE

Summer Law Clerk — Full-time, May 2023 – Present
Elections Division – Oregon Secretary of State — Salem, OR

- Identifying and revising administrative agency rules for conducting Oregon elections.
- Conducting campaign finance and election violation investigations.

Judicial Extern — Full-time, January – May 2023
U.S. District Court, District of Oregon – Judge Mustafa T. Kasubhai — Eugene, OR

- Drafted summary memorandums for pretrial conferences and hearings.
- Drafted judicial opinions after evaluating evidence and researching case law.
- Organized outreach event for District Court and Oregon legal community.

Summer Law Clerk — Full-time, May – July 2022
Legal Aid Services of Oregon, Portland Regional Office — Portland, OR

- Represented client in administrative law hearing for unemployment insurance benefits.
- Researched and drafted arguments for housing and civil rights appellate litigation.
- Drafted pleadings and memoranda for trial litigation.
- Researched and aggregated county case data and trends for evictions courts.
- Wrote letters to landlords to rescind termination notices and sent informational letters to tenants.
- Called clients about domestic violence situations and prepared them for pro se representation.

Legislative Assistant — Part-time, Short Session, January – May 2020
Senator Rob Wagner, Oregon Senate District 19 — Full-time, Long Session, January – June 2021
Senate Majority Office (2021) — Salem, OR

- Conducted meetings with constituents and lobbyists; scheduled and tracked meeting data for legislator.
- Created and sent communications to constituents, lobby organizations, and legislative offices.
- Tracked bill progress and prepared bill memoranda for caucus members.
- Called constituents for individual casework, planned and managed multi-legislator town halls.

INTERESTS

- Personal: Running, flute performance, cooking, hiking
- Legal: Privacy, consumer protection, housing, health, antitrust, white-collar crime

DuckWeb Information System

Name:	Aleesha N Kazi	UO ID:	951899509

NAME:on | RETURN TO MENU | HELP | EXIT

Display Transcript

Info: **University of Oregon - Unofficial Transcript**

Courses in progress may also be included on this transcript.

Notations of Academic Warning appear on this Unofficial Transcript for your information only; Academic Warning notations do NOT appear on the Official Transcript. Official Transcripts can be ordered any time and there are no limits to how many you can order. Official Transcripts are typically required for grad school admission, transfer to another college or university, and for some employers.

Suggestions for saving your unofficial transcript

- Right click and Save As
- Ctrl+P and print to PDF
- Use your browser's print or share options to save as PDF
- Free PDF printers may be available online

Admit Term:	**Fall 2021 Law**
Matric Term:	**Fall 2021 Law**

Term:	Fall 2021 Law	**Level:**	Law

Subject	Course	Title	Grade	Credit Hours	Quality Points	Repeat
LAW	611	Contracts	B-	4.00	10.80	
LAW	613	Torts	B	4.00	12.00	
LAW	615	Civil Procedure	A-	4.00	14.80	
LAW	622	Legal Research & Wr I	B	3.00	9.00	

	Attempted Hours	Earned Hours	GPA Hours	Quality Points	GPA

Current:	15.00	15.00	15.00	46.60	3.10

Rank Status	Level	Rank	(Out of) Total	N-Way Tie	Top %
Ranked	1L	66	172	4	38

Term:	Spr 2022 Law	**Level:**	Law

Subject	Course	Title	Grade	Credit Hours	Quality Points	Repeat
LAW	617	Property	B+	4.00	13.20	
LAW	618	Criminal Law	B	4.00	12.00	
LAW	623	Legal Research & Wr II	B-	3.00	8.10	
LAW	643	Constitutional Law I	A-	3.00	11.10	

	Attempted Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current:	14.00	14.00	14.00	44.40	3.17

Rank Status	Level	Rank	(Out of) Total	N-Way Tie	Top %
Ranked	1L	64	170	2	38

Term:	Fall 2022 Law	**Level:**	Law

Subject	Course	Title	Grade	Credit Hours	Quality Points	Repeat
LAW	610	Mock Trial	P*	1.00	.00	
LAW	619	White-Collar Crime	A	2.00	8.00	
LAW	637	Trusts & Estates I	A-	3.00	11.10	
LAW	649	Legal Profession	A-	3.00	11.10	
LAW	652	Evidence	B+	3.00	9.90	
LAW	678	Indian Law	A-	3.00	11.10	
LAW	707	Sem Moot Court Competn	P*	1.00	.00	

	Attempted Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current:	16.00	16.00	14.00	51.20	3.65

Rank	Level	Rank	(Out of) Total	N-Way Tie	Top %

Status					
Ranked	2L	54	162	5	33

Term:	Spr 2023 Law	Level:	Law

Subject	Course	Title	Grade	Credit Hours	Quality Points	Repeat
LAW	610	Race Gender Bias & Law	A	2.00	8.00	
LAW	651	Trial Practice	A	3.00	12.00	
LAW	707	Sem Moot Court Board	P*	1.00	.00	
LAW	714	Extern Judicial	P*	8.00	.00	
LAW	746	Law and Development	A+	3.00	12.90	

	Attempted Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current:	17.00	17.00	8.00	32.90	4.11

Transcript Totals

	Attempted Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	62.00	62.00	51.00	175.10	3.43
Transfer:	.00	.00			
Transfer Deductions:		.00			
Overall:	62.00	62.00	51.00	175.10	3.43

RELEASE: 7.2[UO.2]

United States District Court
DISTRICT OF OREGON
Wayne Lyman Morse United States Courthouse
405 East 8th Ave., Suite 5400
Eugene, OR 97401

Chambers of
MUSTAFA T. KASUBHAI
United States Magistrate Judge

March 22, 2023

To Whom It May Concern:

It is my pleasure to enthusiastically write this letter in support of Aleesha Kazi. I supervised Aleesha during her full-time externship with our Chambers during the Spring 2023 semester. Before her externship, I became acquainted with Aleesha in her capacity as a student organization leader at the University of Oregon School of Law. In that role, she worked to bring students from marginalized backgrounds for a roundtable discussion and tour of the federal courthouse. In both roles, I have been impressed with her diligence, passion for the law, and her strong analytical abilities.

Aleesha worked on a wide range of projects on our civil docket. She composed several bench memoranda, thoughtfully summarizing claims and potential legal issues in preparation for hearings. These projects required Aleesha to quickly grasp new legal concepts and appropriately apply them to complex factual scenarios.

Aleesha also assisted in drafting an opinion in a complicated Social Security case. During this project, Aleesha skillfully presented her reasoning first orally and later in writing the first draft of the opinion. I was particularly impressed by the ethos with which she resolved close issues, reflecting a sense of justice and fairness that, in my experience, is rare among externs. As we worked through subsequent drafts, Aleesha incorporated feedback thoughtfully and asked insightful questions. That process revealed to me Aleesha's strong writing abilities and enthusiasm to improve.

I am confident that Aleesha will be an extraordinary attorney. I give her my full recommendation. Please do not hesitate to contact me personally if you would like to further discuss Aleesha's candidacy.

Respectfully,

David A. Fauria
Senior Staff Attorney to the Honorable Mustafa T. Kasubhai
United States District Court, District of Oregon
dfauria@gmail.com
(209) 602-7653

Legal Aid Services of Oregon

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April 10, 2023

Re: Aleesha Kazi – Letter of Recommendation

To Whom It May Concern:

I supervised Aleesha as a fellow in the Legal Aid Services of Oregon Portland Regional Office. Aleesha was a Multnomah Bar Association fellow. This was a highly selective fellowship for candidates with outstanding capacity for legal success and who contribute to the diversity of the Oregon State Bar. I worked with her full time for the 10-week 2022 summer internship session after her first year of law school, watching how she interacted with attorneys, clients, and judges.

Aleesha will bring great success to any role. She was a shining star among our law clerks, demonstrating a level of professionalism and capacity that we had never before seen in a student. Aleesha was a leader among her peers, showing patient guidance and kind support for other clerks needing assistance organizing tasks or engaging in legal research. Her legal research skills are outstanding; we had several attorneys who worked with Aleesha state how amazed they were at her ability to find and synthesize key caselaw. Aleesha is a stellar writer. She prepared memorandums, requests for production, witness examinations, openings and closings while at Legal Aid. All were attorney-level work and needed little to no refining.

Aleesha is an exceptional client advocate. She prepared for and represented a client in an administrative hearing for unemployment benefits, where nearly $20,000 in benefits were at stake. She beautifully digested complicated and emotional facts, developed strong thematic statements, wrote pointed examination questions, made excellent objections, and helped the client best tell her story. Aleesha stayed calm during a hearing where both the Employment Department representative and the Employer were hot heads badgering our witness. She demonstrated exceptional trauma informed skills, showing compassion and patience.

Any judge, non-profit, government or private firm will be fortunate to have Aleesha Kazi. She brings a well-developed skill set for compassionate and effective lawyering for those who need it most. She will be an exceptional asset and I hope you will give her application the strongest consideration. Despite her calm and reserved demeanor, she is a hard-working and powerful lawyer-to-be with a heart for working for the public interest and the skills to do so exceptionally.

Sincerely,

Melissa Haggerty

Supervising Attorney
(503) 471-1132
melissa.haggerty@LASOregon.org

May 26, 2023

To whom it may concern:

It is my pleasure to recommend Aleesha Kazi for a judicial clerkship. This past spring, I have benefited from Aleesha's enthusiasm for legal practice and seen firsthand her strong work ethic and passionate engagement with social issues. Aleesha's externship with the United States District Court for the District of Oregon has prepared her to be an engaged and valuable member of any chambers.

During her externship, Aleesha worked on a wide range of projects on our civil docket. She composed bench memoranda in preparation for hearings that thoughtfully summarized claims and potential legal issues. These projects required Aleesha to quickly grasp new legal concepts and appropriately apply them to complex factual scenarios. Aleesha also coordinated projects and assignments for her fellow externs, and was a vital resource to her peers while in chambers.

Aleesha and I worked closely together on a draft opinion resolving a complicated administrative appeal. During this project, Aleesha skillfully summarized the facts of the case and the issues raised at oral argument and presented her legal reasoning in a first draft of the opinion. I was particularly impressed by the attention to detail with which Aleesha summarized the relevant facts from a complex administrative record, reflecting a sustained and focused attention to detail.

I am confident that Aleesha will be a lively and passionate addition to your chambers, as she has been to ours. Please do not hesitate to contact me if you would like to further discuss Aleesha's candidacy.

Respectfully,

/s/ Jenny Logan

Jenny Logan
Senior Staff Attorney to the Honorable Mustafa T. Kasubhai
United States District Court, District of Oregon
Jennifer_logan@ord.uscourts.gov
(541) 431-4125

Aleesha Kazi
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https://www.linkedin.com/in/aleesha-kazi/

WRITING SAMPLE

The attached writing sample is an excerpt of a judicial opinion that I wrote entered into social security case 3:21-cv-01516-MK. The excerpt I would like you to consider begins from the "Discussion" heading on page 5 and ends at the "B. Medical Record" heading on page 10. All of the writing is my own, except for the rules stated in the last paragraph of page 5, the first two paragraphs of page 6, and the first paragraph of page 9. These specific rule paragraphs are from prior opinions that Judge Kasubhai required me to use.

This opinion was very lightly edited by Judge Kasubhai's law clerk, Andrea Clifford, before it was entered into the docket. Only a few sentences and words were changed from the final draft I submitted, which I can also provide a copy of if need be. Thus, this excerpt primarily represents my own work. I have received permission from the Judge to provide this opinion as a writing sample.

> [Plaintiff could] occasionally climb ramps and stairs and never climb ladders, ropes, or scaffolds, and can occasionally balance, stoop, kneel, crouch, or crawl. [Plaintiff could] frequently handle and finger bilaterally; [he could] push and pull as much as [he could] lift and carry; and [could] occasionally operate foot controls bilaterally. [Plaintiff] should [have avoided] concentrated exposure to extreme heat and cold, humidity, and work hazards such as dangerous moving machinery and unprotected heights. He [was] limited to performance of simple routine tasks and [could] have occasional public contact and co-worker contact.

Tr. 20–21.

At step four, the ALJ found that Plaintiff had no past relevant work. Tr. 27. At step five, the ALJ found, in light of Plaintiff's age, education, work experience, and RFC, a significant number of jobs existed in the national economy such that Plaintiff could sustain employment despite his impairments. *Id.* The ALJ thus found Plaintiff was not disabled within the meaning of the Act. Tr. 28–29.

DISCUSSION

Plaintiff asserts that remand is warranted for two reasons: (1) the ALJ erred by improperly rejecting his subjective symptom testimony; (2) the ALJ erred in rejecting medical opinion evidence. The Court addresses each argument in turn.

I. Subjective Symptom Testimony

Plaintiff assigns error to the ALJ's evaluation of his subjective symptom testimony. Pl.'s Op. Br. 4–9, ECF No. 18. When a claimant has medically documented impairments that could reasonably be expected to produce some degree of the symptoms complained of, and the record contains no affirmative evidence of malingering, "the ALJ can reject the claimant's testimony about the severity of his symptoms only by offering specific, clear and convincing reasons for doing so." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). A general assertion that the claimant is not credible is insufficient; instead, the ALJ "must state which . . . testimony is not

credible and what evidence suggests the complaints are not credible." *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). The reasons proffered must be "sufficiently specific to permit the reviewing court to conclude that the ALJ did not arbitrarily discredit the claimant's testimony." *Orteza v. Shalala*, 50 F.3d 748, 750 (9th Cir. 1995) (citation omitted). If the ALJ's finding regarding the claimant's subjective symptom testimony is "supported by substantial evidence in the record, [the court] may not engage in second-guessing." *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002).

Social Security Ruling ("SSR") 16-3p provides that "subjective symptom evaluation is not an examination of an individual's character," and requires that the ALJ consider all the evidence in an individual's record when evaluating the intensity and persistence of symptoms.[3] SSR 16-3p, 2017 WL 5180304, at *2 (S.S.A. Oct. 25, 2017). The ALJ must examine "the entire case record, including the objective medical evidence; an individual's statements about the intensity, persistence, and limiting effects of symptoms; statements and other information provided by medical sources and other persons; and any other relevant evidence in the individual's case record." *Id.* at *4.

Plaintiff testified that he experienced burning nerve pain upon awaking and at night due to his fibromyalgia and connective tissue disorder. Tr. 46-48. He described how this pain affected his hands, feet, wrists, shoulders, eyes, and legs. Tr. 46-48, 325. Plaintiff testified that due to the nerve pain, he could not engage in his daily activities for long and instead did his activities in short increments. Tr. 52. These activities included gripping objects, taking his dog outside, doing household chores, and driving. Tr. 47–68.

[3] Effective March 28, 2016, SSR 16-3p superseded and replaced SSR 96-7p, which governed the assessment of claimant's "credibility." *See* SSR 16-3p, 2017 WL 5180304, at *1–2 (S.S.A. Oct. 25, 2017).